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THE RULE OF DAMAGES IN ACTIONS EX DELICTO.

The April number of the Law Reporter contains an able and elaborate article by Mr. Professor Greenleaf, re-asserting and defending the position originally adopted by Mr. Metcalf, the learned reporter of the supreme court of Massachusetts, in an article in the American Jurist (vol. iii. p. 387,) that damages even in actions of tort must always be strictly limited to compensation; and this doctrine is also supported by the journal in the editorial notice of Mr. Sedgwick's work on the Measure of Damages. To endeavor to maintain ground enfiladed by a cross-fire so formidable as this, may seem a rash undertaking; but disregarding the disparity of strength and numbers, let us address ourselves to the contest — a contest on which we enter with great diffidence as to our own powers, but an unwavering confidence in the strength of our position.

We will first examine the subject on authority, and after ascertaining how it stands in this respect, then look into the matter on principle. But for the purpose of better comprehending the precise nature of the question, let us see exactly what the conflicting propositions are. The doctrine of compensatory damages is thus briefly stated by Professor Greenleaf in his extremely valuable work on evidence: "The plaintiff is not entitled to receive compensation

beyond the *extent of his injury;* nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive." (Greenleaf on Evidence, vol. ii. p. 209.)

This latter clause is ambiguous, and in one sense imports a mere truism; for it is very certain that the defendant *never does in fact* pay more than the plaintiff receives, and no more than he is entitled by law to receive. But the meaning of the phrase, as amplified and insisted upon in Mr. Greenleaf's recent article, is, that the plaintiff's recovery in all cases is limited strictly to *compensation;* not of course to mere compensation for mere pecuniary injury, but "for every circumstance of the act complained of which injuriously affects the plaintiff, in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short, his happiness."[1] The damages must be *compensation* and nothing more. The counter doctrine is thus stated; "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not *only to recompense the sufferer but to punish the offender.*"[2] Of this doctrine, Mr. Greenleaf, in the article already referred to, says that though it may seem justified by the general language of some judges and by "remarks gratuitously made in delivering judgment on other questions, it is not supported *by any express decision*"; and that "though judges have spoken of exemplary or vindictive damages, they have never instructed the jury *in terms* that they were at liberty to increase the damages merely for the sake of punishing the defendant and beyond the amount of injury which the plaintiff had sustained." And it is perhaps worthy of notice, that so completely unauthorized does Mr. Greenleaf seem to consider this doctrine, that it is not alluded to in the chapter in his work on Evidence devoted to the subject of damages, nor would the idea even appear to have occurred to his mind.

We propose in the first place, without further preface, to see how far the above statement of the result of the adjudged cases is correct. The origin of the rule dates back to the time of Lord Camden, and the great controversy about general warrants. In Wilkes' case that great judge said, "As to the damages, I continue of the opinion that the jury are not limited by the injury received. Dam-

[1] Greenleaf on Evidence, Vol. ii. p. 219. Law Reporter for April, 1847, p. 530.
[2] Sedgwick on Damages, p. 39.

ages are designed not only as a satisfaction to the injured person, but likewise *as a punishment to the guilty* and as proof of the detestation in which the wrongful act is held by the jury."[1] In New York the doctrine is as old as the case of *Cheetham* v. *Tillotson*, (3 J. R. 56.) There the charge of the chief justice was, that "the case demanded exemplary damages, as well on account of the nature of the offence charged against the plaintiff, as for the protection of his character as a public officer, which he stated as a strong circumstance for the increase of damages, and *that he did not accede to the doctrine that the jury ought not to punish the defendant in a civil suit for the pernicious effect* which a publication of this kind was calculated to produce in society." And to this precise point the defendant's exceptions were addressed. "The charge of the judge," they say, "was incorrect in stating that the plaintiff was entitled to exemplary damages, on account of the injurious tendency of said publication to the country. *In a private action the party can recover only for the private wrong; he has no concern as to the public offence, for which the defendant must atone by an indictment.*" This, it will be noticed, is precisely the doctrine of Mr. Metcalf and Professor Greenleaf. Now what did the court say? Kent, C. J. reaffirmed the doctrine of his charge, and Spencer, J. said; "In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is *always in charge to the jury that they are to inflict damages for example-sake*, and by way *of punishing the defendant.*" How is it possible to call this language, as Mr. Greenleaf does, "extra-judicial"? How can it be termed "a remark gratuitously made in delivering judgment on other questions"? in view of this case can it be safely said that "no jury has ever been told to give damages to punish the defendant?"

So again, in the same state in a very recent case, *Cook* v. *Ellis*, (6 Hill, 465,) of which Mr. Greenleaf takes no notice, where the defendant, having been punished criminally for assault and battery, it was insisted, in an action brought for the same offence, that the fact of the conviction and punishment should be received in evidence to mitigate damages. The discussion, it will be perceived, turns on the very same principle; and what said the supreme court in excluding the evidence? "We concede that smart-money, allowed by a jury, and fines imposed at the suits of the people, depend on the same principle. *Both are penal*, and intended to deter others from the commission of the like crime.

[1] Lord Campbell's Chancellors, vol v. p. 249.

The former however become incidentally compensatory for damages, and at the same *time answer the purpose of punishment.*" Of this decision the learned author of the article in the Law Reporter takes no notice, and it certainly could not be very well called "a remark gratuitously made in delivering judgment on other questions."

How is it in Pennsylvania? In an action of trespass, *Bride* v. *McLaughlin*, (5 Watts R. 375,) for selling under an execution under circumstances of peculiar injustice and oppression, Grier, president, who is now on the bench of the supreme court of the United States, said, "If the jury believe that the defendants acted in a deceitful, hard, cruel or oppressive manner, they may give not only compensatory, but exemplary and vindictive damages." In error, this was denied to be law, and the counsel for the plaintiff in error cited 3 Am. Jur. 287, (the original article of Mr. Metcalf,) in support of the doctrine now insisted on. But the court said "whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases *not only to compensate but to punish.* There are offences against morals to which the law has annexed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the courts permit the *private* remedy to *become an instrument of public correction.*" Is this too "a remark gratuitously made in delivering judgment on other questions"? How stands the law in the Pennsylvania circuit? In *Conard* v. *Pacific Ins. Co.* (6 Peters, 272,) Mr. Justice Baldwin said, "when a trespass is committed in a wanton, rude, and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in *compensating* the party injured in all he has lost in property, in expenses for the restoration of his rights, in feeling, in reputation; and even this may be exceeded *by setting a public example*, to prevent a repetition of the act." How clearly is the distinction here taken, and the rule for which we contend insisted on.

In New Hampshire the whole subject has been repeatedly considered. In trespass *de bonis asportatis* for a sleigh and horse, the defendant denied that he had committed any tort, and rested his argument upon his innocence of intention, and upon the existence of a bailment at the time he removed the property. Woodbury, J. said, "In respect to the intention, that is not, in cases of this sort, a subject of inquiry, *except to prevent vindictive damages.* In crimes, the intention is the essence of the charge; but in civil actions, the injury caused to the plaintiff is the essence of the charge, and whether committed through ignorance or malice, it is neither more

nor less an injury caused to the plaintiff by the defendant. The intent of the party *may affect the damages*, and as the defendant appears not to have been actuated by any bad motive, nor to have sold or converted the sleigh to his own use, he should pay only *the actual injury* caused by the removal of the sleigh." *Sinclair* v. *Tarbox*, (2 N. H. R. 135.) This recognizes the precise doctrine, that in civil cases, proper for vindictive damages, the amount of recovery varies with the intent of the defendant, and does not depend on the mere question of injury sustained. In an action for criminal conversation with the plaintiff's wife, the judge told the jury, "that in estimating the damages they should look, not only to the character and conduct of the plaintiff and his wife, to see what such a husband ought to *recover* for criminal conversation with such a wife, but to the conduct of the defendant, in order to determine what a person who had conducted as he had *ought to pay*," — thus disregarding utterly and distinctly the notion, "that the defendant should not pay more than the plaintiff ought to receive." To this charge the defendant excepted on the ground "that it directed the jury that the damages might be imposed by the jury as a punishment," insisting that "however reasonable it may be that the defendant should be *punished* for his misconduct *when prosecuted by the state*, the plaintiff had no claim to profit by his degradation." But of this opinion was *not* the court, saying, "after an attentive examination of the subject, we see nothing in the instructions given to the jury in relation to the damages, which we think ought to have been otherwise." *Sanborn* v. *Neelson*, (4 N. H. R. 501.) Is this "*gratis dictum*," "extra-judicial," or is it a "remark gratuitously made in delivering judgment in other cases?"

In a case in the same state, to recover damages for the loss of a horse, arising from defects in a bridge which the defendants were bound to repair, the court instructed the jury, that for ordinary neglect the plaintiff could not recover exemplary damages; but that such damages might be allowed in the discretion of the jury, in case they believe there had been gross negligence on the part of the defendants. In the report of the motion for a new trial, the arguments of counsel are not given, but the court cited *Woert* v. *Jenkins*, (14 J. R. 352), *Tillotson* v. *Cheetham*, (3 J. R. 57), *Huckle* v. *Money*, (2 Wils. 205, 3 Wils. 10,) concurred with the decisions in those cases, and said "the principle is thus established, that in actions for tort to the person and to personal property the jury may give *liberal or exemplary damages in their discretion, — damages beyond the actual injury sustained*, for the sake of the example;

and the only remaining inquiry is, whether this case was proper for the exercise of that discretion." *Whipple* v. *Walpole*, (10 N. H. R. 130.) Is this too a remark gratuitously made ?

In Connecticut, it is certainly true, that in saying that " no principle is better established, and in practice more universal, than that vindictive damages, or smart-money, may be awarded by the verdict of juries," as the supreme court did in the cases of *Linsley* v. *Bushnell*, (15 Conn. 225), *Huntly* v. *Brown*, (15 Conn. 267,) this language was not absolutely necessary for the case before them; but it is equally true, that before pronouncing this language, they had, as will appear by the report, examined the cases on which the doctrine of vindictive damages rests, and that they adopted the principle of those decisions. We suppose that if the inquiry were pursued, similar adjudications might be found in almost every state of the union. Thus in Illinois, in an action to recover damages for seduction of a daughter, it was insisted that the father could only recover the damages sustained by loss of service and expenses; but it was held that the jury might award him compensation for the dishonor and disgrace cast upon him and his family, and for the being deprived of the society and comfort of his daughter, the court saying, " in vindictive actions, and this is now regarded as one, the jury are always permitted to give damages for the double purpose of *setting an example and of punishing the wrong-doer*." *Grabe* v. *Margrave*, (3 Scammon, 373.) So again, in the same state, in an action of trover brought for a horse, it appeared that the defendant, being bailee of the animal to be agisted and fed, used the horse for his own purposes without leave. The horse died a few hours after the unauthorized use, but not in consequence of the using. It was held by the supreme court, in error, that there being no proof of actual damage, they would not set aside a verdict which had been rendered for the defendant. Application being made for a new trial, they refused it, saying " that as the value of the horse was not sought by the proof, the only damages that could be recovered would be in the nature of smart-money, for the wrongful use, which *must be in their nature vindictive, as there is no proof of special damages or injury.* And it is a rule that courts will not grant new trials where vindictive damages only are sought to be recovered, or merely nominal damages." *Johnson* v. *Weedman*, (4 Scammon, 495.) Now it is perfectly true, that in this as in some of the other cases, the present question was not necessary to be decided, but at the same time it is equally clear that the court had considered it, and had made up its mind on it.

We confess ourselves utterly at a loss how, in the face of these decisions, the very learned and acute author of the work on Evidence can say that the rule of vindictive damages, for the purpose of punishment, is not supported by any express decision. We suppose, on the contrary, that in the four states of New York, New Hampshire, Connecticut and Pennsylvania, the point is so conclusively settled, as not to admit of argument. We venture to assert, in New York at least, that this is strictly so. Independent of these decisions, the whole current of authority, and the very nomenclature of the law, require the doctrine for which we contend. What do the supreme court of the United States mean in the case of *Tracy* v. *Swartwout*, (10 Peters, 81,) by laying stress on the difference between compensatory and exemplary damages? Surely words mean something. *Compensatory* damages must be for compensation. *Exemplary* damages are something different. What are they? The new doctrine requires a radical change in the terminology of the law. The learned author of the work on Evidence denies assent to any but decisions expressly on the point, and treats all other as extra-judicial, *gratis dicta*, or as "gratuitous remarks made in delivering judgment on other questions." It is admitted, in the article in this journal above cited, that the doctrine of vindictive damages has been recognized by several eminent judges, but their opinions are called, "gratuitous, extra-judicial," "passing allusions," &c. We beg leave to ask whether the contrary doctrine can find even a "gratuitous, extra-judicial, or passing remark "from the bench in its favor." We know it is constantly said, in general, that damages are intended for compensation; very loose language, at the best, for no verdict ever compensated for the entire injury; but has it ever been decided or suggested, by any judge of any court, that a jury cannot, in actions *ex delicto*, give damages by way of punishment beyond the line of compensation?

As to the principle of the matter, the learned author of the work on Evidence, and the editor of the Law Reporter, seem both to be of opinion, that there is and can be a clear, complete line of division drawn between the public and private interest; indictments being provided for the body social, and suits for the individual. To our minds this division seems entirely fanciful and imaginary. How is it possible so to divide the community and the individual? In organizing civil courts of justice, how much does the legislator take into regard the fact, that social order depends on controversies being adjusted by the public authorities. In *qui tam* actions, how clearly are the public and private interests blended; in all cases of misdemeanors, how manifestly is the party offending subjected to a

double pecuniary punishment, first by verdict, and next by fine. What difference does it make, whether the verdict is for compensatory or vindictive damages? If the verdict is for compensation, and the party injured is completely compensated, what remains of public offence? We apprehend that the suit, in cases which are also punishable by indictment, is a mere cumulative remedy. Surely there is nothing contrary to principle in this view of the case. But there is a very numerous class of cases of reckless negligence and gross fraud, not amounting to criminal offences, and in which, if the plaintiff is to be limited to compensation, no *punishment*, as such, can ever be inflicted. Is this desirable for the purposes of social order? Does the cold doctrine of compensation, in cases of this description, satisfy the *heart* of jurisprudence?

The most serious difficulty, however, occurs in the practical application of Mr. Greenleaf's rule. How is the party to arrive at the measure of compensation? How is a jury to get at remuneration for loss of honor, loss of credit, wounded feelings, injured sensibilities. If it is difficult to minister to a mind diseased, who is to compensate a mind exasperated? What is the rule? What is the standard? Would not a jury, solemnly charged in an action of trespass that they must limit the damages to compensation,—that they must give not a cent more, not a farthing less,—that it must be the pound of flesh, and not a drop of blood—would they not be utterly lost in a metaphysical maze? How are feelings, character, social position, to be estimated in dollars and cents? The old puzzle—"if a pair of andirons cost a dollar, how much will a load of wood come to?" is a practical and intelligible proposition, compared to measuring mental injury by the standard of strict pecuniary compensation. Again, suppose the doctrine established that the jury are to confine themselves to compensation, how is it to be *enforced?* Necessarily by the court. But this certainly cannot be done; on the contrary, the authorities are clear, and the learned author of the work on Evidence, in the article in this journal already cited, admits that the court have no power over the subject, unless the damages are so gross as to raise a suspicion of partiality or passion. So says Mr. Justice Story, refusing to set aside a verdict in an action of this class: "The damages are certainly higher than what, had I been on the jury, I should have been disposed to give; I should now be better satisfied if the amount had been less." *Thurston* v. *Martin*, (5 Mason, 497.) See also *Duberley* v. *Gunning*, (4 T. R. 651,) and a number of similar cases.

So that in adopting the rule of Mr. Greenleaf, we come to these

practical conclusions: *First*, the jury are told that they are to give compensation, and nothing further; *secondly*, they are left without any standard whatever to measure the compensation; and *thirdly*, even if they go beyond the line of compensation, the court has no authority to interfere. The rule is without practical applicability and without any binding efficacy. We confess that, rather than rush into such contradictions, we prefer to take the law as we believe that we find it adjudged in England and in four of the most respectable states of the union. As to "scraping off barnacles," by which poetical figure we are invited, by a learned critic in this journal, to disregard the positive language of the law, we suppose it would hardly add to the value of an Elementary Treatise, if, disregarding the express decisions of courts, it were to adopt a new rule, unsupported by any adjudged case, and environed by so many difficulties.

As to damages being *compensation*, the sooner the idea is got out of the head of a practical lawyer the better; damages are, in no just sense, compensation. In the most ordinary case of a suit on a note of hand, the damages do not amount to compensation. Who pays the counsel-fees? Who pays for the time of the plaintiff? Who pays for his annoyance and vexation? The most successful lawsuit is too often a Barmecide feast. T. S.

Recent American Decisions.

Supreme Court of Errors, Connecticut, Fairfield, June, 1846.

The Washington Bridge Company *v.* The State of Connecticut, on the relation of Colborn, in Error.

In 1802, the general assembly created a corporation for the purpose of erecting a permanent bridge over the Housatonuc river, at the former ferry-place on that river, between the towns of Milford and Stratford, below the port of Derby, which had been established by congress as a port of delivery. By the charter, the company were authorized to collect certain tolls to reimburse the expense of building the bridge; and it was then provided, that as soon as such expense, with an interest thereon of twelve *per cent. per annum*, should be reimbursed from the tolls, the bridge and the rate of tolls should be subject to such order and

regulations as the general assembly should then think proper to make respecting them; but there was no reservation of power, by the general assembly, to repeal, alter, or modify the charter, except in that event, which has not transpired. Besides the building of the bridge and maintaining it in repair, the charter imposed other onerous duties upon the company, among which was the making of a suitable and convenient draw in the bridge over the channel of the river, of the width of thirty-two feet, for the passage of vessels, which should be permitted at all times to pass, toll-free. The company erected a bridge, which was afterwards carried away by a flood. In 1808, the general assembly, by an additional resolution, which was accepted by the company, relieved them from some burdens previously imposed, made their grant exclusive within the distance of six miles on the river, and then added a proviso, that nothing therein contained should be so construed as to impair the rights, privileges and immunities of persons using and navigating said river. The company rebuilt their bridge and kept it in repair, complying with the terms of their grant, until 1845, when the general assembly, on a petition of individuals served upon the company, passed a resolution, requiring the company to make, and thereafter to maintain in good repair, a good and sufficient draw, with the requisite piers, in some convenient place in the channel of said river, not exceeding fifty feet in width, so as to admit the free and easy passage of all registered or licensed vessels, whether navigated by sails or by steam, which should have occasion to pass and repass through the same — the draw to be commenced and completed under the direction and to the acceptance of commissioners, and within such time as they should limit; and it was further provided, that if the company should neglect to comply with these requirements, the owner of any registered or licensed vessel which should be delayed or detained, by the insufficiency of the draw, should recover of the company the amount of damages sustained thereby, and no tolls should thereafter be collected on the bridge until the draw should be completed to the acceptance of the commissioners. On an information in the nature of a *quo warranto*, against the company, alleging a non-compliance with the requirements of this resolution, in consequence of which a large class of the vessels duly registered and licensed to carry on commerce, and which were best adapted for that purpose, were obstructed and prevented from proceeding in their lawful voyages to said port of delivery, it was *held*, 1. that the charter of this company was a contract protected from invasion, by the constitution of the United States: 2. that the resolution of 1808 reserved no authority to the legislature, without the assent of the company, to compel the construction of a draw fifty feet wide, in lieu of the former one; 3. that, as the case showed that no such authority was reserved in the original charter, the company had not subjected themselves to a forfeiture of their chartered rights, by disregarding the resolution of 1845.

THIS was an information in the nature of a *quo warranto*, filed by the state's attorney for *Fairfield* county, on the relation of *Sullivan M. Colborn* v. *The Washington Bridge Company*. The information alleged, that in the year 1799, congress, pursuant to the constitution of the United States, which empowers that body "to regulate commerce with foreign nations and among the several states," constituted the port of Derby, situated on the navigable waters of the Housatonuc river, a port of delivery, annexed to the

collection district of New Haven, which has ever since continued to be and still is such; that said navigable waters are an arm of the sea, where the tide ebbs and flows, communicating with the waters of the Atlantic Ocean in Long-Island Sound; and that said river could be conveniently navigated to and from said port of delivery, by vessels of every description, duly licensed or registered under the constitution and laws of the United States, to carry on commerce among such states or with foreign ports, but for the obstructions about to be mentioned. The information then set forth the charter of incorporation of the Milford and Stratford Bridge Company, afterwards named the Washington Bridge Company, passed in 1802, and sundry subsequent resolutions;[1] all of which were accepted by the defendants.

By the original charter, the defendants were authorized to build a permanent bridge across the Housatonuc river, at or near the ferry-place between the towns of Milford and Stratford, which was below said port of delivery, with the right of reimbursing the expense thereof, by tolls to be collected from all persons passing said bridge. It was also provided, that before the company should be entitled to receive tolls they should pay to the town of Stratford and also to Joseph Hopkins, for the discontinuance of the ferry, from the time the bridge should be completed to the rising of the general assembly in 1806, such damages as should be assessed to them respectively, by a committee appointed for that purpose; and that said company should make in said bridge, over the channel of the river, a suitable and convenient draw, of the width of thirty-two feet, for the passage of vessels; that piers should be extended eighty feet above and eighty feet below the bridge, with suitable spiles for securing said vessels and warping them through said draw; that all vessels should be permitted, at all times, to pass said draw, without payment of toll, and suitable persons should be provided by said company, to open and shut the same, on due notice of the approach of any vessel; that two lamps should be kept at such draw, during every night when vessels can navigate the river, unless the moon should give sufficient light; that in case any bars should be formed in the channel of the river, in consequence of erecting the bridge, so that the navigation of the river should thereby be obstructed more than it had previously been, it should be the duty of the company to remove such obstructions; and that said company should, at all times, at their own expense, keep said bridge in good repair, so long as they should receive the prescribed tolls. By the same charter it was provided, that as soon as the tolls

[1] See Private Statutes, 288—292.

should reimburse to said company the sums by them advanced in building, or rebuilding, or repairing said bridge, expense of committee and clearing the channel, if it should become necessary, with an interest of twelve *per cent. per annum* on the same, said bridge and the rate of tolls should be subject to such order and regulations as the general assembly should then think proper to make respecting the same; but neither in the original charter, nor in any of the subsequent acts or resolutions, was there a reservation of power, by the general assembly, to repeal, alter or modify the grant, in any other event. There was no allegation in the information that that event had taken place.

A bridge was erected by the defendants, pursuant to their charter, which was afterwards carried away by the ice. Upon application made by them to the general assembly, at its session in May, 1807, liberty was granted to them to raise, by a lottery, the sum of forty thousand dollars, to be laid out in building a bridge, on stone abutments and stone piers, across the river where the former bridge was built. In May, 1808, the general assembly released the defendants from the obligation thus imposed on them to build the bridge on stone abutments and stone piers, and then provided, that no bridge should thereafter be erected across said river within six miles of the one to be rebuilt, during the time the defendants were authorized to keep up their bridge and receive tolls thereon, so as to interfere with the grant to them; provided that nothing therein contained should be so construed as to impair the rights, privileges and immunities of persons using and navigating said river.

The information further alleged, that the defendants having erected and rebuilt a bridge, at the place specified in their charter, and having maintained it until May, 1845, the general assembly, at its session in that year, passed an additional resolution, requiring the Washington Bridge Company to make, and thereafter to maintain in good repair, a good and sufficient draw in said bridge, with the requisite piers, in some convenient place in the channel of said river, not exceeding fifty feet in width, so as to admit the free and easy passage of all registered or licensed vessels, whether navigated by sails or by steam, which should have occasion to pass and repass through the same; the draw to be commenced and completed under the direction and to the acceptance of certain commissioners, within such time as they should limit. By this resolution, it was further provided, that if said company should neglect or delay to commence and complete said draw, after reasonable notice and request from said commissioners so to do, and it should happen that any duly registered or licensed vessel, having occasion to pass

up or down said river through the draw in said bridge, should be delayed or detained, or should suffer damage in so doing, by reason of the insufficiency of said draw, the owner or owners of such vessels should recover of said company the amount of damage which he or they should have sustained thereby, before any court proper to try the same; and that no tolls should thereafter be collected on said bridge, until said draw should be made and completed to the acceptance of said commissioners. The information then alleged, that the commissioners limited and appointed the 25th day of September, 1845, for the completion, by said company, of a draw in said bridge fifty feet in width, and gave reasonable notice thereof to said company; yet that said company utterly neglected and refused to make said draw, and disregarded said resolve of the general assembly and the requirements of the commissioners; that the draw in said bridge is but thirty-two feet wide, and by reason of the narrowness of the same, a large class of the vessels duly registered and licensed under the constitution and laws of the United States to carry on commerce, which vessels require a greater width of passage than said draw affords, and are best adapted for carrying on commerce to and from said port of delivery, then were, and for a long time past had been, obstructed and prevented from proceeding in their lawful voyages and commerce to said port of delivery, as they otherwise might and would have done, if said company had complied with said resolution of 1845; and that, by reason of these facts, said company, on said 25th of September 1845, forfeited all their chartered rights, privileges and franchises, as a body politic and corporate; that notwithstanding such forfeiture, the defendants have since, without legal warrant, authority or power, continued to exercise the powers, privileges and franchises of a body politic and corporate, and have continued to maintain their bridge across said river, and a toll-gate at or near the same, and to collect tolls of the good people of this state having occasion to pass thereon; and so the defendants have usurped, and still do usurp, the powers, privileges and franchises granted by their charter; to the great damage of the good people of this state, and of the relator, and in violation of their rights and against the peace.

To this information there was a general demurrer; and the court adjudged it sufficient. The defendants, by motion in error, thereupon brought the record before this court for revision.

Bissell and *Loomis*, for the plaintiffs in error, contended, 1. That the Washington Bridge Company, on the 25th of September 1845, and when the resolution of May 1845 was passed, was a legally

constituted an existing body politic and corporate, duly exercising the powers granted by the act of incorporation and the subsequent resolutions of the general assembly of this state. In the first place, this appears to be true in point of fact, and is admitted by the information, if the legislature could rightfully grant those powers. Secondly, the right and power to make the grant existed in this state, and in the other states of the Union, by virtue of their original sovereignty. *The People* v. *Rensselaer and Saratoga R. R. Co.* (15 Wend. 113, 132.) Thirdly, the necessity of the case requires the exercise of this power, inasmuch as there is no such power in the general government. Fourthly, the power in question has been exercised by the states, by an uninterrupted course of legislation for the period of half a century. Among the bridges erected by legislative authority, over navigable waters below a port of delivery, are those at Kittery, Me., at Portsmouth, N. H., the Charles River and the Warren Bridges at Boston, Mass., at Hartford, Ct. &c. Fifthly, this legislation by the states, has been acquiesced in by the general government. Sixthly, the judicial decisions, so far as they go, recognize these bridges as constitutional and legal. *Piscataqua Bridge* v. *New Hampshire Bridge*, (7 N. Hamp. R. 35, 61, 62, 63.) *Commonwealth* v. *Charlestown*, (1 Pick. 180, 184.) *Commonwealth* v. *Breed*, (4 Pick. 460.) *Charles River Bridge* v. *Warren Bridge*, (7 Pick. 445.) *Livingston* v. *Van Ingen*, (9 Johns. R. 507.) *Lansing* v. *Smith*, (8 Cowen, 146.) *Kellogg* v. *Union Company*, (12 Conn. R. 7.) *Enfield Toll Bridge Company* v. *Hartford and New Haven R. R. Co.* (17 Conn. R. 64.)

2. That the general assembly had no constitutional power to interfere with the franchise of the plaintiffs in error, without their consent, unless upon adequate compensation, until their expenditures had been fully reimbursed. Neither the original charter, nor the subsequent resolutions of the general assembly, contain any reservation of power, express or implied, to repeal, alter or amend the franchise of this company, except in the event referred to; which, it is admitted, has not occurred. *Commonwealth* v. *Breed*, (4 Pick. 460.) *Hartford Bridge Company* v. *East Hartford*, (16 Conn. R. 149, 174, 175.) *Enfield Toll Bridge Company* v. *Hartford and New Haven R. R. Co.* (17 Conn. R. 40, 59.)

3. That the information is insufficient for want of an allegation that any duly registered or licensed vessel has been delayed or has suffered damage; upon which contingency alone the penalty of the law of 1845 attaches.

4. That if the law of 1845 is constitutional and valid, and the plaintiffs in error have failed to comply with its requirements, in

consequence of which the injury intended to be guarded against has resulted, still the consequence is not a forfeiture of the charter. The law of 1845 is to be enforced, if at all, by its own sanctions, viz. a suspension of tolls until the draw shall be made and completed to the acceptance of the commissioners. No greater or other penalty than this can be inflicted.

R. I. Ingersoll and *Butler*, for the defendant in error, after remarking, that the case shows, that there was not merely a detention or delay of the vessels in reaching their port of delivery, while going through "a suitable and convenient draw," but that they were actually shut out from the port — prevented from proceeding in their lawful voyages;" and this, not as to a single vessel or a few only, but as to a large class, and those best adapted to the trade; contended, 1. That the defendants below had no right, by virtue of their original charter of 1802, to shut out this large class of vessels and break up their voyages. The intention of the makers of a statute is to be pursued in the construction of it, and may be collected from the cause and necessity of making it, as well as from other circumstances. (1 Sw. Dig. 11.) Judges are to look at the language of the whole act, and if they find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the larger expression. Dwar. Stat. 704. *United States* v. *Freeman*, (3 Howard, 556, 565.) It would be doing injustice to the general assembly of 1802, to suppose, that they intended their grant to the company to be in subversion of, instead of subordinate to, the act of congress, which had been passed three years previously, and which was then before them. The language they have used, taking it all together, and giving effect to the larger expressions, warrants no such conclusion. The charter authorizes the company to build a bridge, with a draw in it; but this is not all; it requires of them to have "a suitable and convenient" draw. Suitable and convenient for what? The charter itself tell us, "for the passage of vessels." What vessels? The charter answers this question also; "all vessels," and at "all times," toll free. True, it says, the draw shall be "of the width of thirty-two feet." But this, taken in connexion with the larger expressions used, and the paramount object to accommodate all, at all times, must be intended to mean the *minimum* width, not the *maximum*. The legislature do not say, that the draw shall not be of a greater width than thirty-

two feet. But even if there were ambiguity in the language used, this being the charter of a private corporation, the rules of construction require the court to construe it against the company, and in favor of the public. "Where there is any ambiguity found, the construction must be in favor of the public." Dwar. Stat. 749. "Every presumption is to be made against the company, and in favor of private property." Dwar. Stat. 751. In construing deeds of individuals, the language used is construed most strongly against the grantor; but the rule is different in regard to legislative acts. Dwar. Stat. 688-705. *Barrett* v. *Stockton and Darlington Railway Company*, (2 Man. & Gran. 134; 40 E. C. L. 298.) S. C. in err. (3 Man. & Gran. 956.) (42 E. C. L. 496.) *Parkes* v. *Great Western Railway Company*, (7 Scott N. R. 835); *Thompson* v. *The People*, (23 Wend. 537; 11 Pet. 545.) Nor can it be said, that "all vessels" must be intended to mean only the kind of vessels then known, that is, sailing vessels, and not steamers. The latest improvement may be always used, though not in use at the time of the grant. *Bishop* v. *North*, (11 Mees. & Wels. 418, 425.)

2. That the provisions of the resolution of 1808, accepted and acted on by the defendants below, are inconsistent with their present claim. The bridge having been carried away by a previous flood, and this arm of the sea being open to the freest navigation, the general assembly, on the application of the company, in 1807, granted them a lottery, with liberty to raise therefrom $40,000 to rebuild their bridge; and by an additional resolution in 1808, released them from some previous obligations and burdens resting upon them, and promised to permit no other bridge to be erected within six miles of the one to be rebuilt. Having done this, the general assembly add the following important condition: "nothing herein contained shall be so construed as to impair the rights, privileges and immunities of persons using and navigating said river." The company were then at liberty to reject the proffered aid, with the condition annexed to it, if they had seen fit. They might have declined the offer, and gone on to rebuild, with their own means, and under their original, unaltered charter. But they did not choose to do so; they accepted the terms. The case shows, that the present bridge was rebuilt under the resolution of 1808; and the company, having availed themselves of the means thus conditionally furnished to rebuild their bridge, now claim, that they are authorized still to prevent a large class of vessels, and those best adapted to the business, from navigating the river. Is it so, that while the engagements of 1808 on the part of the state, are binding, the corresponding engagements of the company are to go

for nothing? It is said, however, that the resolution of 1808 authorizes the company to rebuild generally, under the same restrictions and conditions as are in the original act. They do so, but with this controlling proviso added; that the authority thus to rebuild, with the means put at their disposal by the state, shall never be so construed as to impair the rights of navigation. This language of the proviso, to which the company have assented, must be satisfied. It cannot be rejected; nor can it be construed in accordance with the claims of the company; unless this court can say, that there are no rights of navigation that can be recognized in the owner of vessels of more than thirty-two feet breadth of beam; and this too, when all the rules require us, as we have seen, to construe the charter strictly, as against the company, and liberally, as against the public.

3. That every citizen of the United States having a license for the coasting trade, has a right to deliver his cargo at the port of delivery. This was settled in the leading case of *Gibbons* v. *Ogden*, (9 Wheat. 1, 212, et seq.) Now, when the owner of a vessel having this right by virtue of the license, is shut out from his port of destination, it is too plain to be argued, that his rights are impaired.

4. That these positions being established, it was the right and duty of the general assembly, on finding that the company were so construing their charter as to impair the rights of navigation, to require them to act up to the spirit of their contract, and permit all vessels, at all times, to go through. This was settled in *Bunnel* v. *East-Haven Bridge Company*, (4 Conn. R. 54.) "The object of this visitorial authority," say the court, in that case, "is too apparent to admit of controversy: it is for inquiry into and prompt correction of all abuses practised by the company, under color of their charter; for directing an observance of the charter prescriptions; and for compelling obedience to such directions. A construction which falls short of this, must presume that the legislative inspection, instead of usefully protecting and enforcing the rights of the public, was intended to be nugatory and inefficient." The proviso in that charter, was not half so strong and distinct as it is in this. Instead of a clear and ample reservation of the rights, privileges and immunities of navigators, as we have here, it contained nothing but this: "always provided, that nothing in this grant shall operate to injure or affect the property of any individual, or of the proprietors of common and undivided lands in New-Haven, but the property and privileges of individuals, and said proprietors, are hereby saved." And yet that was held, by the

supreme court of errors, to be sufficient to cover the rights of navigation.

5. That if the general assembly had attempted to grant, what the defendants below claim was granted,—the right to shut out from this port of delivery a large class of registered and licensed vessels, that are, as the case finds, best adapted to carry on commerce, the grant would have been void, as coming directly in conflict with the constitution of the United States, and the laws of congress. This has been placed beyond all controversy, by the decision in *Gibbons* v. *Ogden*, (9 Wheat. 1, 217.) "If the power reside in congress," say the supreme court, "their acts applying that power to vessels generally, must be construed as comprehending *all* vessels. If none appear to be excluded, by the language of the act, none can be excluded by construction." It matters not whether they are navigated, by means of the winds or by steam, nor how constructed; for the court, in the same case, say: "The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act." Nor is it any answer, to tell us, that the state had made a contract with the company, which should be held inviolable. It is immaterial how the exclusion is effected, whether by means of a contract or otherwise. The state of New York had made a contract with Fulton and Livingston, which excluded from her ports a certain class of vessels; but the exclusion was no less unconstitutional on that account. See also the doctrines of *Gibbons* v. *Ogden* commented on and enforced, in *Barque Chusan*, (2 Sto. R. 445, 465.) *North River Steamboat Company* v. *Livingston*, (3 Cowen, 713.) *The People* v. *Saratoga and Rensalaer R. R. Co.* (15 Wend. 113, 131.) SAVAGE, Ch. J., giving the opinion of the court, says, that any obstruction, at the place referred to, (an arm of the sea,) entirely preventing or essentially impeding the navigation, would be unlawful. Our own court, in *Kellogg* v. *The Union Company*, (12 Conn. R. 7,) adopt substantially the same doctrine. The court, by BISSELL, J. speaking of certain state enactments, say: "They are mere municipal regulations, and whenever adopted, the question arises, and it is one to be settled by the judicial tribunals, whether they do in fact conflict with the laws of congress. If they do so conflict, they must undoubtedly yield."

6. That the remedy by *quo warranto* is the proper one. The action of the state, by the resolution of 1845, is sufficient to justify its officers in enforcing the requirements of the general assembly;

and this court is bound, by the official oath of the judges, to "support the constitution of the United States," as well as the constitution of the state of Connecticut. It is no objection to this remedy, that the resolution of 1845 gives to each person injured redress by action. That remedy is merely cumulative, and does not affect the right to proceed by *quo warranto*. *The People* v. *Bristol and Rensselaerville Turnpike Company*, (23 Wend. 222.) *The People* v. *Hinsdale and Chatham Turnpike Company*, (*Id.* 254.) *The People* v. *Kingston and Middletown Turnpike Company*, (*Id.* 193.) *Thomson* v. *The People*, (*Id.* 537.)

CHURCH, J. This information or writ of *quo warranto*, presented by the state's attorney against the Washington Bridge Company, is not prosecuted on the ground that the defendants' bridge is a public nuisance, obstructing the common and free use of the Housatonic river, as a navigable stream; but the point of grievance complained of, is, that the Washington Bridge Company have disregarded a resolution of the general assembly of May 1845, and have thereby forfeited their chartered rights. That resolve required the company to make and maintain in repair a good and sufficient draw, not exceeding fifty feet in width, and so as to admit the free and easy passage of vessels, &c. to be commenced and completed under the direction and to the acceptance of commissioners, and within such time as they should limit; and directing, among other things, that no tolls should be collected until such draw should be thus made and completed.

This requires of us an opinion regarding the constitutional power of the legislature to pass the resolution referred to; for if no such power existed, a disobedience of its demands could not work a forfeiture of rights, nor incur any other penalty.

By the original charter of the company, no power was reserved by the legislature to repeal, alter or modify it, nor to impose additional burdens upon the corporation, after they had complied with the terms prescribed by the grant, until they should be reimbursed their expenses in erecting the bridge, &c., together with an interest of twelve *per cent.* thereon; an event which has not yet transpired.

That charter not only requires of the Washington Bridge Company to erect and keep in constant repair a costly structure, but also to remove obstructions in the river, as well as to pay the proprietors of the ancient ferry such compensation for the loss of their franchise as should be awarded to them. In return for all this, as a fair equivalent, the right to receive stipulated tolls was conferred. There is no principle of constitutional law or of morals, which can

justify the exaction of other duties or the imposition of further burdens, without a further equivalent provided.

Ever since the case of *Dartmouth College* v. *Woodward* was decided, by the national court, recognizing the charters of private corporations as contracts protected from invasion by the constitution of the United States, no other court in this country has disregarded the doctrine; and we consider it now as obligatory and settled beyond our reach either to deny or disregard, even if any of us should doubt its original propriety. The supreme court of the United States holds ultimate jurisdiction over constitutional questions growing out of the national constitution. Therefore, although it may be true, that to create a private corporation without a reserved legislative power over its charter, is an act of improvident legislation, yet the judiciary has no remedial powers to apply.

In the argument, it was pressed upon us, by the counsel for the relator, that the resolution of the general assembly, passed on the subject of this bridge in 1808, and which was acquiesced in and accepted by the defendants, authorized the resolution of 1845. But, to give the resolve of 1808 all the effect which the relator can reasonably claim, it only secures the rights, privileges and immunities of persons using and navigating the river; it reserves no authority to the legislature, without the assent of the company, and without providing for compensation, to compel the construction of a draw in the bridge fifty feet wide, in the place of one thirty-two feet wide, as directed by the charter; nor that it be completed within any definite time. It leaves those whose rights of navigation it protects, and which may be impaired by the bridge, to such remedies as the law has provided.

We are constrained, therefore, upon this information, to say, that the Washington Bridge Company has not subjected itself to a forfeiture of its chartered rights, by disregarding the resolution of the general assembly of 1845; and shall advise the superior court, that the information is insufficient. It will be perceived, that in coming to this result, we have not found it necessary to discuss several questions which were suggested in the argument; as whether or how far, the legislature can create a franchise which may conflict with the power of congress to regulate commerce; or whether the defendants can justify, under their charter, the continuance of the bridge in its present condition, if in fact it essentially hinders or obstructs the passage of vessels to and from a port of delivery above it; nor what will amount to such an obstruction. Those questions have not passed without notice; but we have not thought a decision of them to be necessary, in the present case.

In this opinion the other judges concurred. Judgment reversed.

Circuit Court of the United States, Massachusetts District, April, 1847, at Boston.

FRANKLIN ADAMS & Co. *v.* JOSEPH F. BLODGETT and WELLS and LIBBY, Trustees.

Assignment by an insolvent debtor, at common law, for the benefit of his creditors ; — Attachment by trustee process of funds in the hands of an assignee ; — Insolvent law.

THE question in this case was, whether Libby, one of the trustees, was chargeable on his answer. It appeared that Blodgett, finding himself in failing circumstances, called a meeting of his creditors, and proposed to give up all his property, (the principal part of which was in Maine,) to be equally divided, not asking to be discharged, but promising to pay the balance when able. Libby, at the request of some of the creditors, proceeded to Maine, and had received several hundred dollars; when the plaintiffs, who reside out of the state, and were not at the meeting of the creditors, commenced this suit, and summoned Libby as the trustee of the defendant. The creditors who assented to the arrangement, had claims to a larger amount than what had been collected by Libby.

P. W. Chandler, for the plantiffs.
George M. Browne, for the defendants.

WOODBURY, J. in deciding the case made the following points: — (1) It seems, that if the creditors of a failing debtor meet and agree to take an assignment of all his property towards paying the debts of all, and to have him continue responsible for any balance, and this is carried into effect by taking such assignment and possession of the property, it is valid against one of the creditors, who was not present, and brings a trustee process against the agent of the creditors, who has charge of the property. The consideration is good, on account of the trust or contract, and the presumed assent of those creditors not expressly dissenting. But here it was clearly good, as the creditors actually assenting had claims exceeding in value all the property assigned. (2) A conveyance to a portion of one's creditors, for a full consideration, is valid at common law, and *a fortiori* a conveyance to all of them. Such encouragement, the debtor agreeing still to be liable for the balance, is better for

them than the insolvent law; and cannot be considered a fraud upon it. The insolvent laws have repealed the act of 1836, in Massachusetts, as to preferring creditors, but do not abrogate all conveyances like this at common law. (3) It seems that the present creditor can now come in and obtain his pro rata share of the property assigned for the benefit of all, or can, for the usual reasons, have the case put into insolvency under the statute, and the property thus distributed. But the proceedings already had are valid till this is done.

The plaintiffs then moved that Libby be charged for the amount in his hands that would belong to them on a *pro rata* division of the estate; and the case was continued, to enable them to ascertain how much this would amount to.

District Court of the United States, Massachusetts District, at Boston.

HENRY H. CROCKER ET AL., Libellants, *v.* PATRICK T. JACKSON.

It is settled in the law of insurance, that the delay to save life is not a deviation, and that delay solely to save property is.

Where a vessel was seen in distress by another, and it was impracticable, at the time, to board the former, and both vessels were drifting out of their course, and time was saved by taking the former in tow, it was *held* that it was not a deviation to do so.

And although the master of the latter vessel was actuated by a double motive, to relieve distress and to save property, it was *held* that his conduct was justifiable, and therefore did not constitute a deviation.

Whether a previous deviation would render a ship-owner liable to a freighter for a subsequent loss, not connected with it,—*quære*.

THIS was a libel in the Admiralty, on behalf of the owners of the barque La Grange, against the respondent, a consignee of part of the cargo, to recover a contribution for damage sustained, by the voluntary stranding of the vessel, near Provincetown, during a gale. The respondent was insured by the Merchants Insurance Company, and the defence was made and conducted in their behalf. The defence principally relied upon, was, that the La Grange had previously committed a deviation in going out of her course to speak, and subsequently taking in tow, a vessel in distress.

It appeared in evidence, that, on the 21st of November, it then blowing fresh with a heavy sea, a brig was seen from the La

Grange about three miles to leeward, with no sail set, apparently in distress; that the La Grange ran down to her, and found her to be the brig Samuel, of Portland, having lost, or split all her sails, with no materials to mend them, short of provisions, the mate and one hand sick below, and another partially disabled. The sea was running so high that it was impracticable to send a boat on board. The master of the Samuel requested the master of the La Grange to lay by, until he could be furnished with supplies, and saw what he could do. Both vessels were then drifting fast out of their course, and in order to save time and distance, the master of the barque proposed to take the brig in tow. This was done by dropping from the barque a boat, with three men and the end of a hawser; lines were thrown to it from the brig, and the hawser thus got on board. Afterwards supplies were furnished. In about four hours afterwards, the brig began to make sail, and was kept in tow for about thirty-six hours, until within about fifteen miles of Boston Light, when it came on to blow, and the hawser parted or was cast off, and both vessels ran for Provincetown. The reason given why the brig was so long kept in tow, was, that she was in a crippled condition, by reason of her having no heavy canvass to set, and of the sickness of her crew, and want of provisions, and that the barque had not sufficient to supply her, and for her own use, if they should be driven off, and therefore it was deemed expedient to keep together, and to supply the brig as wanted.

It was argued for the defence, that the delay caused by going out of her course, and taking the brig in tow, was a deviation; that there was no necessity for taking the brig in tow, certainly not for towing her for so long a time; that a deviation could be justified only for the purpose of saving life, and if that had been the object here, the crew might have been taken off; that from the measures taken, the master of the barque must have intended to claim salvage. For the libellants, it was argued, that it was the duty of every master, on seeing a vessel in distress, to delay or go out of his course to speak her, and to give such assistance as he could; that such delay did not constitute a deviation, though delay for the sole purpose of saving property would; that there was no authority to sustain the ground taken by the defence; that it was according to the usages of the seas, for vessels to stop and aid others in distress, a usual incident of a voyage, and so not a deviation; and that good policy, and so far as insurers were concerned, their own interest required that the master should have the right to perform this duty, without subjecting his owners to the risk of losing their insurance, and becoming responsible to the freighters for the cargo; also, that the loss in the present case, could not be attributed to

the alleged deviation, and that the ship-owner was not responsible to the freighter for a loss which occurred subsequently to a deviation, and not in consequence of it.

F. C. Loring, for the libellants.
R. Fletcher, for Merchants Insurance Company.

Sprague, J. It is settled that delay to save life is not a deviation, and that a delay solely to save property is. The rule as to intermediate cases is not settled. The general principle in respect to contracts of affreightment and insurance is, that the voyage shall be performed in the usual way. A voluntary departure from it is a deviation; — but what is a voluntary departure? Parties must be held to contemplate the usual incidents of a voyage. In this case, when the brig was seen in distress, it was the duty of the La Grange to run down to her and afford some relief. It is objected that it was a deviation to take her in tow. It appears, that at the time, it was impracticable to board her, and that both vessels were drifting out of their course, and that time was saved by taking her in tow. This was expedient and judicious, and not a deviation, though *prima facie* the presumption would be otherwise.

The question is, whether she was not kept in tow too long? It is argued that in doing so, the master of the barque was influenced by the hope of salvage, and I should have been better satisfied if he had let her go earlier; yet I cannot say that he was not influenced by a desire to aid the crew in their disabled condition, under the peculiar circumstances of the case. What then should be the law, where the master acts under a double motive, — to relieve distress and to save property? I am not disposed to say that in such a case he shall act under the penalty of throwing the whole burden, in case of loss, upon his owners. If he may have been actuated by motives of humanity, and not merely the hope of salvage, he ought to be treated with indulgence. If he is to be held liable in doubtful cases, he must harden his heart, and avoid the distressed.

Such a doctrine would be injurious to the morals and humanity of the seas. I have therefore come to the conclusion, though with much hesitation, that the conduct of the master in this case was justifiable, and therefore did not constitute a deviation. This conclusion renders it unnecessary to consider the other questions, whether the delay was the cause of the loss, and whether a previous deviation would render a ship-owner liable to a freighter for a subsequent loss, not connected with it, which does not appear to have been settled.

Supreme Judicial Court of Maine, April, 1847, *at Portland.*

JABEZ C. WOODMAN *v.* JOSEPH FREEMAN ET AL.

Equity ; — Sale of land ; — Fraud ; — Jurisdiction.

THIS was a bill in equity, alleging fraud in the defendants, in reference to the sale of a tract of land to the plaintiff. The object was to obtain a remuneration for the injury consequent upon the alleged fraud. SHEPLEY, J. delivered the opinion. The court held that the plaintiff's remedy was to be sought at law, and did not come within the jurisdiction of a court of equity ; and dismissed the bill, without prejudice to his rights at law.

Samuel Fessenden, *Howard* and *Woodman*, for the plaintiff.
Willis and *Fessenden*, *Daveis* and *Son*, and *Hill*, for the defendant.

URSULA F. ROBINSON *v.* WILLIAM H. SWETT ET AL.

Duress ; — Jurisdiction ; — Municipal court ; —Justice of the peace ; — Default.

THIS action was on a bond taken in a bastardy process. The process had been duly entered in court, and Swett had been defaulted, and the usual judgment of affiliation had been entered against him, together with an order to pay a certain sum per week, &c. The defence was that the bond had been obtained by duress of imprisonment. It appeared that it had been taken in a process in the usual form, instituted and prosecuted before a justice of the peace, in the city of Portland. WHITMAN, C. J. delivered the opinion of the court. Upon an examination of the statutes in reference to the jurisdiction of the municipal court of that city, the court came to the conclusion, that justices of the peace were ousted of jurisdiction, in all cases in which the parties interested lived therein ; and that the complainant and accused were parties interested in the case ; and further, that the default of the accused and consequent judgment thereon did not estop the defendants to maintain the defence, now set up against their liability upon the bond.

Fessenden, *Deblois* and *Fessenden*, for the plaintiff.
Haines, for the defendants.

ROBERT J. ROBINSON ET AL. in Equity *v.* T. R. SAMPSON ET AL.

Equity ; — Rehearing.

THIS cause had been argued at a former term, and an opinion delivered dismissing the bill. But in the opinion of the court, it appeared, if one of the defendants had been examined as a witness in behalf of the plaintiffs in reference to the facts disclosed by him in his answer, as is sometimes admissible in equity proceedings, and would have been so in this case, that such facts would have tended to establish the allegations of the plaintiffs against the other defendants, whereby they might be rendered chargeable. A petition was thereupon presented by the plaintiffs for a rehearing, with a view to avail themselves of the desired testimony. But the court, in their decision, delivered by TENNEY, J. ruled that such a proposition was inadmissible, as the existence of the evidence must have been within the knowledge of the plaintiffs, before the cause was set down for argument, preparatory to the decision which had been made, dismissing the bill.

Fessenden, *Deblois* and *Fessenden*, for the plaintiffs.
Willis and *Fessenden*, for the defendants.

ISAAC STURDEVANT *v.* THE CITY OF PORTLAND.

Collection of taxes by distraint; — Ministerial officers ; — Action on money had and received.

THIS was an action for money had and received. The object was to recover money, which had been duly and legally assessed upon the defendant in several different years, but which it was alleged had been irregularly collected of him by distraint, by the acting collectors of taxes in those years. TENNEY, J. delivered the opinion. The court did not definitively decide as to the irregularities relied upon, but intimated a doubt, whether they were actually such. But the court held that the assessment being regular, and the defendant being liable to be assessed, the assessment might be regarded as in the nature of a judgment ; that it was a regular ascertainment of an amount due to the city ; and as the law had provided certain ministerial officers to enforce payment, who had collected the sums so assessed, and paid the same into the treasury, that an action for money had and received would not lie to recover

it back. The court intimated an opinion, that the plaintiff's remedy, if he was entitled to any, was against the ministerial officers, the collectors, the same as against the sheriff or his deputies, for irregularities in collecting amounts due on judgments by virtue of executions.

Howard and *Shepley*, for the plaintiff.
W. T. Fessenden, city solicitor, for the defendants.

ISAAC STURDIVANT *v.* EPHRAIM STURDIVANT.

An inchoate right of dower is an existing incumbrance.

THIS was an action on a note, promising to pay a certain sum within one year after the defendant should so become possessed of a certain farm, so that he could convey it free and clear of incumbrances. At the time of giving the note there was an inchoate right of dower existing in a woman whose husband was then alive, but who subsequently deceased; whereupon her dower was claimed and set off to her in the farm, and is still held by her. It was insisted, as the defendant acquired the actual possession of the farm before the dowress had become entitled to have dower assigned to her, that the defendant had had it in his power to sell the farm free of incumbrances. But the court, in their opinion, delivered by SHEPLEY, J., held that the right of the dowress, though but contingent at the time of giving the note, was an existing incumbrance, as decided in this state and Massachusetts, (citing the authorities) although Mr. Justice Story on one occasion had expressed a different opinion. Some other points were raised and decided in this case, but of minor importance.

Howard and *Shepley*, for the plaintiff.
Haines, for the defendant.

ENOCH LITTLEFIELD *v.* THE CITY OF PORTLAND.

Defect in highway;—Witness;— Liability of teamster's servant.

THIS was an action to recover remuneration for a hogshead of molasses, lost, as was alleged, by reason of a defect in a highway, which the city was bound to keep in repair. Exceptions were taken at the trial to the admission of the teamster, who was driving

the vehicle on which the molasses was loaded, to testify that he was driving with due care, and that the molasses was properly laden, &c. The objection was, that he came to exonerate himself from responsibility; but it appeared that he was but the servant of the owner of the team, to whom he was responsible, if to any one, and that the owner had contracted to transport the molasses, and so, was alone responsible to the plaintiff. The exceptions were therefore overruled. The opinion was delivered by TENNEY, J.

Woodman, for the plaintiff.
W. P. Fessenden, city solicitor, for the defendant.

JOSEPH M. GERRISH ET AL. *v.* THE PROPRIETORS OF UNION WHARF.

Flats; — Low-water mark; — Riparian proprietors; — Ordinance of 1641.

THIS was an action for use and occupation. The plaintiffs claimed to be the owners of certain flats, one corner of which it appeared, extended nearly or quite to the wharf of the defendants. The plaintiffs contended that the wharf covered a part of the flats, but the jury had determined otherwise. Vessels in passing to and from some portions of the wharf, necessarily passed over the plaintiffs' flats, and when lying at the wharf, where those flats were contiguous to it, necessarily at low-water rested thereon. But it did not appear that the defendants had ever exacted or received dockage therefor. The court ruled, as the vessels had a right, at high-water, or when they could float, to come to the wharf there, so they would have a right, at least so far as the defendants were concerned, to remain there, while lading or unlading at the wharf; and that nothing could be recovered of the defendants on account thereof.

SHEPLEY, J. delivered the opinion of the court. It appeared that, whether the plaintiffs' flats would come to the wharf, or be more or less remote from it, depended on what, under the colonial ordinance of 1641, should be deemed to be low-water mark. The court noticed the decision in *Sparhawk* v. *Bullard*, (1 Met. 95,) and remarked that whether they should concur in the decision there made, that the ordinance would carry the right of the upland proprietor to the lowest low-water mark, was doubtful; that this case, under the finding of the jury, did not require a decision upon that point; but intimated an inclination to the conclusion, that ordinary low-water mark was the more certain and rational boundary

to be defined; that an owner could never know when he had found one extreme low-water mark, but that a casualty might occur which would carry him further.

Davis and *Son*, for the plaintiffs.
Willis and *Fessenden*, for the defendants.

ROBERT P. DUNLAP *v.* JOHN D. BUZZELL.

Promissory note; — Action by party not interested in the note.

THIS action was brought on a note of hand, by the plaintiff, as indorsee. It appeared that the plaintiff had no interest in the note; that at the request of the owner, he had consented that the action should be brought in his name. TENNEY, J. delivered the opinion. It was held that this formed no ground of defence to the maker.

Haines, for the plaintiff.
Fessenden, *Deblois* and *Fessenden*, for the defendant.

INHABITANTS OF BATH, PETITIONERS FOR A CERTIORARI TO THE COUNTY COMMISSIONERS FOR THE COUNTY OF CUMBERLAND.

Power of county commissioners to discontinue the part of a road laid out jointly with another county which lies in their own county; — Certiorari; — Indictment.

IT appeared that the county commissioners of the counties of Lincoln and Cumberland, had, in pursuance of the provisions of law, laid out a road between Brunswick and Bath, extending into each county; and that the inhabitants of Bath, had made and constructed so much of it, as lies in Lincoln; and that the county commissioners of Cumberland had undertaken to discontinue a portion of what had been jointly laid out in Cumberland. The prayer was, to have these latter proceedings quashed. But the court dismissed the petition, upon the ground, as laid down in their opinion, delivered by WHITMAN, C. J., that the petitioners had no direct interest in the object sought to be accomplished, other than what pertained to the citizens generally, and remarked, that an indictment for not opening the road, as first laid out by the action of the two boards, would bring the matter properly before the court, so that a determination could be had, whether the county commissioners of either county, without the concurrence of both boards, could

discontinue any portion of the road, so conjointly laid out; and the court indicated a leaning to the conclusion, that they could not.

Fessenden, Deblois and *Fessenden*, for the petitioners.
Willis and *Fessenden*, for the respondents.

JACOB G. LORING ET AL. *v.* JERE PROCTOR.

Jurisdiction of the supreme and district courts; — Incidental points of law; — Practice; — Trial.

THIS cause was sent to this court from the district court, under a statement of certain facts and points, supposed to be points of law, purporting to be sent forward in pursuance of the statute of this state, of 1845, c. 172. The court came to the conclusion, that no cause should be so sent up to this court, except upon a full report, and such as would enable this court to make a final disposition thereof; that it could not have been intended, upon the arising of every and any incidental question, in the progress of a trial, in the court below, that it should occasion it to be sent into this court under the statute; and that, upon deciding the incidental question, jurisdiction should be entertained, and a final trial be had therein; that such a course would break down the limits, originally intended and prescribed to the jurisdictions of the two courts. The court moreover, considered that the points raised in this case were more properly questions of fact, than of law, and ordered the cause to be dismissed from their docket.

JAMES B. THORNTON *v.* LORING FOSS.

Flats; — Ordinance of 1641.

THIS was an action of trespass, for taking cart-loads of mud from certain flats, which the plaintiff claimed to be appurtenant to a thatch bed, owned by him. He did not own the upland in the vicinity of the thatch bed. It appeared that the thatch bed was entirely overflowed by high tides; and generally by ordinary tides. SHEPLEY, J. delivered the opinion of the court. The court decided in conformity to the decision in *Lufkin* v. *Haskell*, (3 Pick. 356,) that the ordinance of 1641 did not extend to grants of land entirely covered at high water, and nonsuited the plaintiff.

Bradley and *Haines*, for the plaintiff.
Howard and *Shepley*, for the defendant.

MARY ORNE, Appellant, from a decree of the Judge of Probate, *v.* HARRIET ORNE ET AL.

DANIEL ORNE ET AL. Appellants from a decree of the Judge of Probate, *v.* MARY ORNE.

Bequest in lieu of dower; — Widow's election; — Allowance to widow.

IN the first case the judge of probate had decided that Mary Orne was not entitled to an allowance out of the personal estate of her late husband, upon the ground, as he considered it, that she had accepted of the provision made for her in his will. In the second case he had decided, that dower should be allowed her of the same estate. He had so decided, with seeming inconsistency, because a certain transaction, when he allowed her claim of dower, was not brought to his notice, and which was fully developed when he refused the allowance in the personal estate. The husband had provided in his will, that she should be supported by his son Columbus, to whom he had bequeathed the principal part of his estate for that purpose: and she was to live with Columbus, or elsewhere, as she might prefer. She continued with Columbus for a year or two, and then seems to have preferred to live with her son William; — and Columbus, holding certain notes against him, amounting to about six hundred dollars, agreed to give him up those notes, if he would undertake to support his mother for seven years, and she agreed to this arrangement. This was urged, as an acceptance of the provision made for her in the will. Columbus at this time had not proved the will; and soon after he had done it he died, and thereupon the mother signified, as required by the statute, and within six months after the probate of the will, that she elected to waive the provision made for her in it. Upon this state of facts, the court considered the supposed waiver, before the probate of the will, as not precluding her from making her election effectually, as provided by law, within six months after the probate of the will, and affirmed the decree, allowing her dower; but in consideration that she had no children to support, and had for several years derived her support out of the estate through Columbus, and was still deriving benefit under the contract with James, from the same source, in the exercise of a sound discretion deemed it unreasonable that she should derive any further benefit from the personal estate of her husband, and so affirmed this decree also.

WILLIAM BURGHER *v.* HENRY RASHMEDE.

Promissory note; — notice to indorsers.

ASSUMPSIT against an indorser of a note of hand. The defendant denied that he was duly notified of demand and non payment by the maker. The proof, was by the deposition of the notary public, living in New York, that he, on the last day of grace, made demand at the residence of the maker, and he not being at home, payment was not obtained, and, that the same afternoon, he left a notice of *such non payment* for the defendant, with a gentleman attending at his residence in New York; that this notice was partly printed and partly written, and had attached thereto his name as notary public. The court, in their opinion, delivered by WHITMAN, C. J., held that such notification must have been sufficient to have conveyed to the defendant information that the note had been duly demanded, and was unpaid, and that he was looked to for payment, and such as should have put him upon taking care for his own security.

Willis and *Fessenden*, for the plaintiff.
Codman and *Fox*, for the defendant.

CHARLES JORDAN *v.* JOHN D. GARDNER.

Payment; — Memorandum check; — Money had and received.

THIS was an action for money had and received. The defendant had held a mortgage of certain real estate, which had come into the hands of the plaintiff, from one Henry Gooding, who was bound to clear the estate from this incumbrance, and who, when one of the notes secured by the mortgage fell due, called upon Gardner to take it up; but not having money enough with him for the purpose, gave his memorandum check for the deficiency, and took the note. The check was never taken up by Gooding, and when the last note fell due, he had failed. The defendant refused to consider the estate as redeemed, or to discharge the mortgage, unless the plaintiff would pay the amount of the memorandum check, as well as the last note. When the right of redemption was near expiring, the plaintiff paid the amount claimed, protesting that the memorandum check was payment *pro tanto*, and gave notice at the same time, that he should take measures to recover back the amount of it of the defendant, and brought this action for that pur-

pose. But the court, per SHEPLEY, J., held that the memorandum check was not payment, and nonsuited the plaintiff.

Fessenden, *Deblois* and *Fessenden*, for the plaintiff.
Haines, for the defendant.

OLIVER E. SILSBY *v.* JOSEPH LUNT ET AL.

Statute of limitations; — New promise by one of several copartners.

ACTION upon a note of hand; — defence, the statute of limitation. A new promise in writing by one of the defendants, was relied upon, to avoid the statute bar. The defendants were partners when the note was given, and it was signed by their firm name. Some years after, they took in another partner, and assumed a new name. This the court held to be a dissolution of the former partnership; but before the acknowledgment of one of the firm was obtained, the defendants resumed their former name. When the acknowledgment of one of the defendants was obtained, the others protested against it, in the presence of the holder of the note. It was insisted, by the plaintiff, that the defendants were copartners, and that one copartner could bind the others; and that the Revised Statutes, c. 146, § 20, which provides, that no one of any number of joint contractors shall have it in his power to bind the others by any promise or acknowledgment, in reference to a debt, barred by the statute, does not apply to copartnerships. But the court, in their opinion delivered by TENNEY, J., held that the statute did apply to copartners, and that one of three copartners could not bind the others when they were present, and forbade it, in the hearing of the contractee, and directed a nonsuit.

Burnes and *McCobb*, for the plaintiff.
Haines and *L. P Merrill*, for the defendants.

Circuit Court of the United States, Ohio, April, 1847.

JAMES G. WILSON *v.* JOHN H. STOLLEY.

[FROM THE NOTES OF MR. JUSTICE MCLEAN.]

Reasonable notice is required to be given to the defendant, of the time and place when and where a motion for an injunction will be made.

The defendant will be heard in opposition to the motion, and he is permitted to file his answer.

Affidavits will be received in behalf of both parties, especially in patent cases.

Under the rules of the court, a bill which requires an answer, must contain interrogatories. — *Western Law Journal.*

Digest of American Cases.

Selections from 3 Story's (United States Circuit Court) Reports. (Continued from p. 38.)

AUCTION SALE.

1. Where certain mill privileges belonging to the defendants were sold at auction by H., as their agent, to the plaintiff, and, after the lapse of five years, when the property had greatly deteriorated, the plaintiff brought the present bill in equity, charging that H. had, by sham-bids, fraudulently enhanced the price far beyond the real value of the property; but not charging the defendants with knowledge and connivance with him, at the time of the sale; it was *held*, that as the false bidding by the auctioneer was unauthorized by the seller, it would not avoid the sale, although it would be a good ground of action against the auctioneer for damages; that H. ought to have been made a party to the bill; and that the lapse of such a length of time was, under the circumstances, a bar to the present suit. *Veazie* v. *Williams*, 612.

2. A purchase by an auctioneer, for himself, at a sale made by him in behalf of his principal, is not void, but voidable by the principal; but third persons cannot question the sale. *Ib.*

BILLS OF EXCHANGE.

An accommodation-acceptor of a bill of exchange is a surety as to the drawer, but a principal as to the holder, although the holder knew him to be an accommodation-acceptor. *In the matter of Babcock*, 193.

COMMON CARRIER.

1. Where a box of gold sovereigns was shipped on board the ship North America, to be carried for hire from New York to Mobile, and the bill of lading only contained the usual exceptions against "perils of the seas," and the ship was wrecked on the "Honda Reefs," and the captain then removed the box from the state room where it could be locked up, and placed it in the run where the crew had free access, and allowed it to remain there, without personally superintending it, while the wreckers were on board, and the box was lost, and a libel was brought against the captain and owners to recover its value. It was *held*, that the burden of proof was on the respondents to show, that the loss occurred by a "peril of the seas," and that, failing in this, they were responsible for the loss, however it occurred. *King* v. *Shepherd*, 349.

2. *Held*, *also*, that the mere fact, that the vessel was wrecked did not vary the liabilities of the owner and master as common carriers, unless the property perished with the wreck, and in consequence of the wrecking — but that they were bound to exert all possible diligence, care and skill; and that the evidence showed, that the captain was grossly negligent in the present case. *Ib.*

3. *Held*, *also*, that the captain had no right to abandon the vessel to the care and custody of the wreckers. *Ib.*

4. *Held*, *also*, that the value of the coins was to be estimated at their worth at Key West at the time when proceedings were there instituted for salvage, with interest from such time. *Ib.*

5. The act of God, which would excuse a common carrier for a loss of goods, must be the immediate and not the remote cause of the loss. *Ib.*

6. The same rules of law are not applicable to losses under policies of insurance and by common carriers. *Ib.*

7. There is no difference, in point of law, between common carriers on

land and common carriers by water. *Ib.*

8. Where a vessel, by which goods are transported for hire, becomes disabled, it is the duty of the carrier master to forward the goods by another ship, if practicable; and his duty as carrier is not ended until they are delivered at their place of destination, or are returned to the possession of the owner, or kept safely until the owner can resume them, or otherwise lawfully disposed of. *Ib.*

CORPORATION.

1. Under the act of 1809, the power to lay assessments is vested exclusively in the corporation, and cannot be delegated to the directors. *Ex parte Henry Winsor*, 411.

2. Where the powers and privileges of the Norfolk Manufacturing Company were, by its charter, made subject to the provisions of the act of 1809, and a by-law was passed authorizing the directors "to take care of the interests, and manage the concerns of the corporation;" it was *held*, that the corporation had no power to delegate an authority to the directors to lay assessments, and that the said by-law did not, in fact import an intention to delegate it.

3. And the said company, having first made a dividend of ten per cent. and before payment thereof, laid an assessment of ten per cent. payable on the same day; it was *held*, that the corporation were not entitled to take the dividend of any stockholder, without an order from him, in payment of any debt due from him, to the corporation, or as a set-off to the assessment, or as a charge upon any shares, which might afterwards be sold.

4. Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the legislature, it becomes defunct, and the suit abates, unless the legislature, by some act, saves the right of action against the corporation. *Greely* v. *Smith*, 657.

COPYRIGHT.

1. Any new and original plan, arrangement or combination of materials, will entitle the author to a copyright therein, whether the materials themselves be new or old. *Emerson* v. *Davis*, 768.

2. Whosoever by his own skill, labor and judgment writes a new work, may have a copyright therein, unless it be directly copied or evasively imitated from another work. *Ib.*

3. Where the plaintiff wrote an arithmetic, the plan, arrangement, and illustration of which he claimed to be new, it was *held*, that the taking thereof was a violation of his copyright, although the materials and the several particulars of his plan had existed before in separate forms and in separate works, inasmuch as they had never before been united in one combination in the same manner. *Ib.*

4. To constitute a piracy of copyright, it must be shown that the original work has been either substantially copied, or has been so imitated as to be a mere evasion of the copyright. *Ib.*

COSTS.

1. Where a survey was ordered by the court; it was *held*, that the expenses thereof were borne equally by both parties, since it was for their mutual benefit. *Whipple* v. *Cumberland Cotton Co.* 84.

2. It is the common practice not to allow costs to the prevailing party, where the district judge differs from the circuit judge. *Veazie* v. *Williams*, 612.

DEPUTY COLLECTOR.

1. Under the act of 1822, ch. 107, the offices of deputy collector and of inspector may be held by the same person at the same time. *United States* v. *Morse*, 87.

2. The 15th section of the same act, limiting the emolument of the deputy collector to $ 1000, applies only to the emolument received by him as deputy collector, and does not prevent him from receiving additional compensation for independent offices in the customs held by him at the same time. *Ib.*

3. A deputy collector is not bound by that act to perform the duties of inspector. *Ib.*

DESERTION.

1. By the general maritime law, desertion is an unauthorized absence from the ship, with an intention not to return, and it creates a forfeiture of wages. *Coffin* v. *Jenkins*, 138.

2. The statute of the United States, declaring any unauthorized absence of a seaman from his ship for forty-eight

hours to be desertion, applies to all cases where the seaman does not return within such time, although he may have been prevented by the sailing of the ship. For the ship is not bound to wait for him, but he is bound to rejoin the ship within that period, *suo periculo*. *Ib.*

3. In the present case it was *held*, that the circumstances showed, that the desertion by the plaintiff was the result of a previous and deliberate intention to desert; and at all events, an opportunity having been offered to him to rejoin his ship within the forty-eight hours, that his refusal to do so constituted a desertion, and he had thereby forfeited his wages. *Ib.*

4. The only cases where desertion does not carry with it a forfeiture of wages, are cases having mitigated circumstances, where the party deserting had a strong excuse, founded on gross misconduct or harsh usage towards him; or where, having a *locus pœnitentiæ*, he has acknowledged his fault, and offered to return to his duty within a reasonable time and his services have been rejected; or cases of a similar nature. *Ib.*

EQUITY.

1. An answer in equity to facts charged in the bill is to be taken to be true, until the contrary is cleary esblished. *Hough* v. *Richardson*, 659.

2. Where a bill in equity was brought to set aside a sale of certain timber lands seven years after the purchase thereof, during which time the agent of the purchaser had made two explorations of the land, and had caused a large quantity of timber to be cut therefrom; it was *held*, that the purchasers had full knowledge or means of knowledge of the condition of the lands, through their agent, which they were bound to exercise, before cutting down timber, and locating the property as their own; and that the bill was not maintainable after so great a lapse of time, particularly as it set forth no new discoveries in relation to the quantity and value of the timber, which might not have been obtained in a single year, and as the evidence was obscured as to the material points. *Ib.*

3. A verdict upon an issue, ordered by a court of equity, is not final upon the facts it finds, nor binding upon the judgment of the court, unless it is sanctioned and adopted by the court upon the subsequent hearing on the merits. *Allen* v. *Blunt*, 742.

4. Where a partner fraudulently, without the consent of his co-partners, applies the partnership funds to his private purposes and profit, or invests the same in his own name and for his own use, his copartners may, if they can distinctly trace the investment, follow it, and treat it as trust property held for the benefit of the firm, by the partner or by any person in whose hands it may be, except a *bona fide* purchaser without notice. *Kelly* v. *Greenleaf*, 93.

5. The same rule also applies to trustees and agents, and exists, not only in equity, but at law, wherever the right is of a legal nature.

6. In the present case, a bill was brought by A. against the representatives of his deceased partner, B., and it appearing that B., without the knowledge and consent of A., appropriated certain partnership funds to the purchase of real estate, upon which there was a certain mortgage; it was *held*, that a decree be rendered in favor of the plaintiff, and the real estate be sold under a master, and the proceeds be applied, first to the discharge of the mortgage, and the residue to the discharge of the debt due from B. to the partnership.

7. The court may, for the purpose of avoiding unnecessary delays, entertain a motion to amend a bill in equity, at the same time, that exceptions thereto are filed, and may require the defendants to answer the amended matter and the exceptions together. *Kittredge* v. *The Claremont Bank*, 59.

8. Where, in the answer to a bill in equity, it was set forth, that as the plaintiff was a bankrupt, and his assignee was not made a party to the bill, the plaintiff was not entitled to relief; it was *held*, that the objection of bankruptcy should have been taken *in limine* by way of plea, and could not be insisted on to avoid exceptions taken by the plaintiff to the answer. *Ib.*

9. In the present case, exceptions were taken by the plaintiff to the answer, on the ground, that the statements of the defendants therein contained were not "to the best of their knowledge, remembrance, information and belief," as required by the bill, and were imperfect and insufficient, and the exceptions were allowed by the court.

It was *held*, that the defendant was bound to answer as to his information, and remembrance and belief, as well as to his knowledge. *Ib.*

10. Where A. and B. held certain valid claims for services during fifteen years against the estate of the intestate, and his administrator gave notes therefor, with the understanding, that the notes should only be good for the amount allowed by the judge of probate, and the administrator credited himself with the amount of the note given, as money paid, and the claims were fully allowed by the probate judge, and the plaintiffs being heirs, and having received their portion of the estate, after nineteen years brought this bill to set aside the allowance, as fraudulently obtained; it was *held*, that the proceedings by the administrator were wholly unjustifiable, but that the plaintiffs had been guilty of gross laches in not bringing their suit before, and as the parties making the original claim were dead, and as the evidence on which the court had proceeded was wholly gone, that the judgment was to be presumed as founded upon a valid claim, although personal notice had not been served upon the plaintiffs. *Gould* v. *Gould*, 576.

11. This court possesses full jurisdiction in equity in all cases of fraud, including fraud in obtaining judgments and decrees in other courts, excepting fraud in obtaining a will of real and personal estate; and has concurrent jurisdiction with the state courts in all such cases. *Ib.*

12. A court of equity will never entertain a bill for relief, even in cases of asserted fraud, when the plaintiff has been guilty of gross laches and unreasonable delay. *Ib.*

13. To found a claim for relief in equity, it is not sufficient for the plaintiff to raise suspicion of bad faith, but he must establish it beyond reasonable doubt. *Ib.*

14. An answer responsive to allegations in a bill in equity, is positive evidence, and to be taken as true, unless disproved by the testimony of two credible witnesses, or of one credible witness and facts entirely equivalent to and as corroborative as another witness. *Ib.*

15. Lapse of time is a sufficient bar to a bill in equity to rescind a sale on account of fraud, where the plaintiff might have acquainted himself, at the time of the sale, with the facts, and especially if the circumstances be greatly changed, and the evidence be lost, or obscured. *Veazie* v. *Williams*, 612.

16. Where, in the answer to a bill in equity, an allegation was made impeaching the *bona fides* and validity of a codicil to a will, which had been already approved and allowed by a court having competent and exclusive jurisdiction over the probate thereof, it was ordered that the allegation be expunged as being impertinent and immaterial. *Langdon* v. *Goddard*, 1.

17. Where, also, there was an allegation in the answer setting up an attempted settlement by the defendant with the plaintiffs, of the nature and terms of which no account was given, and which was never acceded to by the plaintiffs, it was ordered to be expunged as immaterial and irrelevant. *Ib.*

18. Where an interrogatory was put, as to "whether, on the 20th day of August, 1838, the said A. prepared and procured the signature of the said B. to a codicil, in which the said B. bequeathed to the said A. the said notes of C. and D., and whether the said A. retained the codicil after its execution:" It was *held*, that although the interrogatory was not so full and precise as it should have been, yet that it was sufficient to call for a full and explicit answer to its plain import, and as the answer was inexplicit and evasive, the defendant was ordered to make a full disclosure of the facts, and to pay the costs of the hearing on the exceptions; and leave was granted to the plaintiff to file additional interrogatories. *Ib.*

19. Certain timber land was purchased by A. of X. and Z., A. agreeing to pay therefor at the rate of one dollar per thousand feet for all the good pine timber, to be ascertained by certain persons appointed by all parties, who were accordingly appointed, and made the estimate. A. subsequently conveyed a portion to D., D. agreeing with X. to pay therefor one fourth of the price in money and the remainder in notes, and they giving a bond to convey to him the land on full payment of the notes. D. died insolvent, and A. became his administrator, and agreed with X. and Z. in his behalf to surrender the bond for the notes, which was done. The present bill was afterwards brought by A. as administrator of D., and charged that

there was a gross error in the original appraisement, unknown to him, (A.), by which D. had been induced to make the said bargain, and prayed that the bargain should be set aside, and the purchase-money paid by D. should be refunded. But A. made no personal claim for relief. It was *held*, 1. That the bill was objectionable for multifariousness in mixing up the independent claims which A. had personally, and which he had as administrator; 2. That it set forth no case for cancelling the original agreement; 3. That even if it had, it was too defective and loose to support such a claim, in not bringing the proper parties before the court, and in alleging a mere mistake, without fraud, as a ground of relief, which, under the circumstances, was not sufficient. *Carter* v. *Treadwell*, 25.

20. Where the legislature of Massachusetts passed a resolve, authorizing the county commissioners of Bristol to examine the claims of the plaintiff against the county, and to make him proper allowances therefor; and also to refer his claims to the determination of arbitrators mutually chosen by themselves and the plaintiff, which determination should be final; and afterward, accordingly, the plaintiff presented his petition to the county commissioners, praying them to refer all his claims to arbitrators, and they passed an order to refer certain of his claims, but not all, to which the plaintiff declined to accede, and brought the present bill to compel the commissioners to refer the whole of his claims, and to agree upon arbitrators selected from the schedule of persons offered by the plaintiff; it was *held*, that the commissioners had no authority under the resolve to submit a part of the plaintiff's claims, without submitting all; that the act of the commissioners, in executing the authority under the resolve, was not founded in a contract, but was an exercise of judicial functions, — but that were it otherwise, a court of equity would not enforce an agreement to submit a question to arbitration; and that the present case was not one, in which a specific performance could be decreed, since such a decree might be both impracticable and inequitable, and that the proper remedy of the plaintiff against the defendants for a refusal to act judicially under the resolve, was by mandamus. *Tobey* v. *County of Bristol*, 800.

21. This court, as a court of equity, possesses no revisory power over the state courts, in the exercise of their jurisdiction. *Ib.*

22. An agreement to submit a question to arbitration will not be enforced in equity, but must depend on the good faith and honor of the parties; but an award under such an agreement will be enforced. *Ib.*

23. Courts of equity never enforce the specific performance of any agreement, where the decree would be a vain and imperfect act, or where the specific performance might be productive of injustice to the parties. *Ib.*

24. An agreement to submit a matter to arbitration, is, both at law and in equity, revocable before the award is given, but not afterward; and it cannot be made irrevocable by any agreement of the parties. *Ib.*

25. The specific performance of an agreement is not a matter of right, which a party can demand from a court of equity, but is merely a matter resting in the sound discretion of the court. *Ib.*

26. This court has ample power to entertain a cause over which the state court has jurisdiction, provided this court have full concurrent jurisdiction.

The citizenship of the plaintiff and of the defendant should be stated in the bill. *Vose* v. *Philbrook*, 336.

27. A bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree. *Jenkins* v. *Eldredge*, 300.

28. Rehearings in equity are only allowed in this court where some plain omission or mistake has been made, or where something material to the decree is brought to the notice of the court, which had been before overlooked. *Ib.*

29. Where the petition prayed for leave to file a supplemental bill to bring forward new evidence, and for a rehearing in the cause when such supplemental bill should be ready, it was *held*, that the new evidence could not be brought forward by a mere order on the petition, but could only be admitted in a supplemental bill, where testimony could be taken on both sides. *Ib.*

30. On a rehearing, no evidence is admissible but that which was used in

the case at the original hearing, or was taken, and might then have been used. But where there is a document, which, by mistake, has either not been proved, or not been properly proved, leave will be granted under special circumstances to exhibit an interrogatory for that purpose. *Ib.*

31. The same doctrine also applies to cases where there is a petition for leave to file a supplemental bill to bring forward new evidence. *Ib.*

32. Witnesses, who have been already examined in a cause, cannot be again examined by a master without a special order of the court, and then only in respect to facts not before testified to by them, and not then in issue. *Ib.*

33. New oral testimony, tending merely to corroborate evidence on the one side or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill. *Ib.*

34. No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature, that it would, if unanswered, require a reversal of the decree. *Ib.*

35. After an interlocutory decree, a supplemental bill to admit new evidence is never granted, where the party might, by due diligence, have introduced such evidence originally in the cause, or where he had full means of knowledge within his reach. *Ib.*

36. Where the new evidence offered to support a supplemental bill was, 1. To establish that the date of the agreement between the plaintiff and the defendant was after the time fixed in the interlocutory decree in the suit between the plaintiff and Deblois; 2. To impeach some of the plaintiff's witnesses; 3. To establish that the decree was not by consent, but *in adversum;* 4. That the value of the original property was far below what it was estimated; it was *held*, that as all of these points were in issue in the original cause, and were elaborately argued, and as the evidence was then within the reach of the defendant, and might, by ordinary diligence, have been produced, and also as they would not materially influence the opinion of the court if they were established, that they were not a sufficient foundation for a supplemental bill. *Ib.*

37. *Held also*, that, under the circumstances of the case, the dismissal of the bill in equity by the plaintiff against Deblois was not on the merits, and could only have been justified by the consent of the parties, and was therefore no bar to the present suit; but, that had it been without consent, nevertheless as it was not on the merits, it was no bar. *Ib.*

38. Where an attempt was made to overturn the testimony of one of the plaintiff's witnesses by showing that his testimony before the Master contradicted the statements in his original examination, it was *held*, that as his examination before the master as to matters previously testified to by him without a special order from the court, was improper, it could not be admitted. *Ib.*

39. It was *held*, that the defendant should pay all ordinary costs. *Ib.*

40. The plaintiff, J., purchased at auction from D. a certain lot of land, and on the failure of J. to comply with the terms of the sale, D. entered and took possession, but on application by J. was enjoined in equity from making a sale thereof. A new arrangement was then made, by which D. placed a warranty deed in the hands of P. in escrow, agreeing that it should be surrendered to J. on a certain day, provided that by such day J. had complied with certain terms of payment, J. making a deposit of $ 1000 as forfeit money. J. then proceeded to build on the said land, but failing in his means was unable to comply with his agreement. D. then threatened to sell the premises, and J. filed a second bill in equity to restrain the sale, and an injunction was granted, and an interlocutory decree was passed, that if J. should perform his agreement before a certain time, the injunction should stand continued, but otherwise should be dismissed. J. failed to perform his agreement, and the bill was accordingly dismissed. In the intermediate time, however, between the decree and the dismissal of the bill, J. having expended large sums on the building and exhausted his resources, applied to E., the defendant, for his aid to raise money to complete the building and discharge the debts. And it was arranged between them, that an absolute conveyance of the premises should be made by D. to E., which was done, and on the same

day J. executed a release of all interest to E. to complete the title, excluding in terms "all claims and demands made by, through, or on account of J., and also excepting any claim or demands arising out of any contract made by or with J.," and admitting that he, J., had no legal or equitable right in the same. E. then assumed the ostensible ownership of the property, and J. was employed in superintending the erection of the building, and procured securities to assist in raising funds, and procuring work to be done on his own account. E. afterwards sold the premises to K., one of the defendants.

In this state of things, the present bill was brought by J. against E. and K., setting forth, that at the time of making the absolute conveyance to E., although no paper to such effect was executed, yet that it was understood between E. and J. that the premises were to be held by E. in trust for the benefit of J., and that the conveyance was made absolute solely for the purpose of freeing the premises from all claims by or through J., and that E. was only to receive a remuneration for any services which he might perform, and indemnification for his expenses, and then to reconvey the estate to J.; and also, that K. was not a *bona fide* purchaser for a valuable consideration without notice. It was *held;*

1st. That the circumstances showed no sufficient motive on the part of J. to induce him to make an absolute and unrestricted conveyance, but that they were perfectly consistent with the parol trust, as set up by the bill.

2d. That as the decree in the equity suit was not a dismissal upon the merits, it did not constitute an absolute bar to a future suit.

3d. That the release by J., although absolute in its terms, was indispensable to guard the property against J.'s creditors, so as to induce capitalists to advance funds, and therefore was not inconsistent with a parol trust, and that the evidence was irreconcilable with any other supposition, than that E. was acting throughout as the agent of J.

4th. That if E., knowing that J. only intended that he should act as agent, did, nevertheless, intend to act for his own benefit solely, the concealment of such a design from J. was a fraud in equity.

5th. That this was a case of parol trust resulting from agency, and resting upon honorary obligations, and as such a court of equity would enforce it.

6th. That it is not within the statute of frauds, because, 1st. It is a resulting trust as to the plaintiff, and a trust as to E. merely for his liabilities, compensation, and expenditures; 2d. It is a case of agency; 3d. It is a case of constructive fraud; 4th. It is a case of part-performance.

7th. That the circumstances did not show that K. was a *bona fide* purchaser without notice, since even if he had no notice of the actual state of the title and the claim of the plaintiff, he had sufficient notice of the claim and controversy to be put upon inquiry, which was sufficient notice in equity.

8th. That although the plaintiff may never have been able to comply with his agreement with the defendant, by discharging the incumbrances and remunerating the defendant, yet that furnishes no ground upon which a court of equity can say that the plaintiff's rights are extinguished, though it might furnish a ground to foreclose his rights and order a sale, on application by the defendant. *Jenkins* v. *Eldredge*, 183.

41. In the courts of equity in this country, evidence as to confessions and statements by the defendant, not charged in the bill, are equally admissible in equity as at law — with this qualification, that if one party keep back evidence, which the other might explain, and thereby take him by surprise, the court will allow the party to be affected by it to controvert it. *Ib.*

42. In cases of a joint purchase, where each purchaser is to have an interest in the purchase in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it. *Ib.*

43. It is a fraud for an agent to avail himself of his confidential relations to drive a bargain, or to create an interest adverse to that of the principal in the transaction, and that fraud creates a trust, even when the agency must be proved only by parol.

44. The present bill was brought during the pendency of a suit in the supreme court of the state against both the parties to the present bill, to enforce a claim in respect to these premises; and it was *held*, that as the parties, the

objects, and the equities were different, and the relief prayed for proceeded upon different grounds and involved a different decree, that it constituted no bar to the present suit.

45. An agreement for a lease of certain premises was made by the plaintiff to the defendant, K., on the 1st of January, 1839, and subsequently, E., on the 18th of Janury, 1841, in pursuance thereof, agreed to lease the same to the said K. and to W. for ten years from the 1st of June, 1841, the annual rent being fixed by the award of referees made in virtue of the said last agreement, at $4,650. K. then took possession, and occupied the premises upon these terms until December 14th, 1842. E. then claiming to be the owner, conveyed the premises to K. on March 1st, 1842. On March 7th, the plaintiff filed with K. a notice of his claim thereto; and subsequently K., as owner, agreed with himself and W., as proprietors of the Boston Museum, to reduce the rent to $3,000 and taxes. The present bill in equity having been filed by the plaintiff against K., the matter was referred to a master, who reported, 1st. That the agreement by E. was a present demise; 2d. That K. was liable for the full rent of $4,650; 3d. That the evidence did not justify a reduction of the rent by K.; 4th. That the interest was properly charged upon the rent; 5th. That K. was not entitled to commissions as trustee for the plaintiff. The court approved the 1st ruling, on the ground, that as no further act of demise was contemplated, and K. having taken possession under the agreement, it was a present demise for ten years. The court approved the 2d ruling, on the ground, that any reduction by K. of the rent originally fixed by referees after notice of the plaintiff's claim, and without his consent, was an act which, not being for the plaintiff's benefit, would, in the event of the establishment of his claim, be unauthorized. The 3d and 4th rulings were assumed as necessary consequences of the second. The 5th ruling was overruled, on the ground, that as K. held the premises as trustee of the plaintiff, and had not been guilty of gross misconduct, he was entitled to his commissions, although he was not an open and express trustee. *Jenkins* v. *Eldredge*, 325.

46. It was also *held*, that the defendant should pay all ordinary costs of the suit. *Ib.*

FRAUD.

Where the plaintiffs were manufacturers, in England, of "Taylor's Persian thread," and the defendants, in America, imitated their names, trademarks, envelopes, and labels, and placed them on thread of a different manufacture; it was *held*, that it was a fraudulent infringement by the defendants of the right of the plaintiffs, for which equity would grant relief; whether other persons had, or had not done the same. *Taylor* v. *Carpenter*, 458.

LEASE.

An agreement for a lease will be construed to be a present demise, if no future formal lease be contemplated, and especially if possession be taken under it. *Jenkins* v. *Eldredge*, 325.

LIBEL.

1. The answer to a libel should be sworn to by the respondent, but the libellant is not bound to answer the libel. *Coffin* v. *Jenkins*, 109.

2. A special replication by the libellant under oath is not admissible, unless it be demanded by the respondents, or ordered by the court, and then it is in the nature of a cross-bill or reconventio of the civil law.

NEW TRIAL.

A new trial will not be granted for surprise on account of new evidence, whenever, by reasonable diligence, it could have been previously obtained. *Washburn* v. *Gould*, 122.

OFFICER.

Where a particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision upon those facts is, in the absence of any controlling provision, absolutely conclusive. *Allen* v. *Blunt*, 740.

PARTNERSHIP.

A lay or share in the proceeds or catchings of a whaling voyage does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and governed by the same rules. *Coffin* v. *Jenkins*, 108.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF MICHIGAN. Vol. I. By SAMUEL T. DOUGLASS. Detroit: 1846.

THIS volume is entitled to a more extended notice than we can usually give to a new volume of reports, both as being not only the first volume of Mr. Douglass, but also the first of the decisions of the Supreme Court of Michigan. And we are happy to say that we have derived much pleasure from its perusal. The court is too little known with us to enable us to give much weight to its decisions as mere authority, but the cases in this volume evince knowledge and ability much superior to the average of American decisions. We were especially struck with the importance of the principles involved in the cases, and the independence with which they are decided by a court with a limited tenure of office. In *Michigan State Bank* v. *Hastings*, and *Same* v. *Hammond*, the court sustained its jurisdiction in equity, of a claim on state officers to restore property conveyed to the state by the complainant on a condition subsequent (alleged to have been broken) and by the state put into the hands of certain of its officers in their official capacity. The condition was the indemnification of the bank against certain debts. In the same case the court unhesitatingly followed the decisions of the supreme court of the United States (although doubting their correctness) and disregarded as unconstitutional an act repealing the charter of a bank without cause shown, where no reservation of a right to repeal had been made. Both of these decisions are extremely able.

In *Green* v. *Graves*, the court declared the general banking law of Michigan, which authorized any twelve persons to associate themselves for banking purposes, and thereupon to be a corporation, to be repugnant to the clause in the state constitution, "that the legislature shall pass no act of incorporation unless with the assent of at least two thirds of each house," on the ground that the constitution required the mind of the legislature to pass upon every new corporation. The opinion of the court is a very good specimen of judicial reasoning. In view of the financial history of Michigan these cases eminently show judicial independence.

In *The People* v. *Tisdale*, the court *held*, that a vote (at a political election) for "J. A. Dyer" could not be counted for "James A. Dyer," and that no parol testimony as to who was meant was admissible. This is contrary to a decision in 8 Cowen, 102, and strikes us as too likely to lead to irremediable confusion and great practical injustice to be admitted, as no great principle is violated by a contrary doctrine. They *held*, however, that a vote for "Jas. A. Dyer" could be counted.

In *Beach* v. *Botsford* the court *held*, that a statute requiring a writing "to be signed in the presence of a witness" meant a *subscribing* witness.

In *Kirby* v. *Ingersoll* the court, in a very elaborate opinion, *held*, that one partner cannot make an assignment of all the partnership property in trust for creditors, when the other partner was attending to the business and could have been, but was not, consulted.

In *Rossiter* v. *Chester*, the court reluctantly decide that the doctrine of average on a loss at sea is so exclusively

maritime as not to be applicable to the lakes. It cannot be long before a different doctrine will prevail either by statute or decision, and it is to be regretted that under circumstances, which could never exist in England, the court was so exclusively governed by English law.

In *Platt* v. *Drake*, the court *held*, that notice to the indorser of a promissory note that the note "has been *protested* for non-payment, and that the holder looks to you," &c. is not sufficient notice to charge the indorser. In the Western Law Journal for May, 1847, is a report of a subsequent decision by the same court that such notice is sufficient in case of a foreign bill of exchange. The report is accompanied with some strictures on *Platt* v. *Drake*, which seem to us very just. We are not satisfied with *Detroit* v. *Jackson*, (2 marginal note,) nor with *Kimmel* v. *Willard's administrator*, (2 marginal note.) The case of *Scott* v. *Detroit Young Men's Society*, p. 119, involved the delicate question of the period of the commencement of the legal existence of the state of Michigan, and was brought before the supreme court of the United States this last winter by writ of error, but the court declined jurisdiction in the case. The point in question was a very interesting one, and arose in this manner: In 1836, the people of Michigan territory, without the sanction of any act of congress, organized a state government, and proceeded to pass laws as a *state*, but it was not admitted into the union until 1837. In 1836, they chose presidential electors, but the votes of those electors being with the majority did not affect the result, and therefore there was not any occasion to decide upon their admissibility. The defendant (plaintiff below) was incorporated in 1836, by a *state* act, and it was insisted, that until the admission of Michigan into the union in 1837, all her acts of legislation were invalid. The court *held*, however, that under the celebrated ordinance of 1787, the people of that territory had a right as soon as they numbered 60,000, to form themselves into a *state* independently of any action of congress, though the consent of congress was necessary to perfect their right to admission into the union. In the supreme court of the United States, Mr. Woodbridge made a very cogent argument against this decision. Indeed, it is somewhat difficult to bring the mind to acquiesce in the extreme position taken by the court of Michigan, although it might well be held, that the admission of the state was a ratification of the doings of the people prior to such admission.

In *Harlan* v. *The People*, the court took jurisdiction (under a statute of Michigan,) of the offence of counterfeiting the current coin. A similar decision has been made in this state in *Commonwealth* v. *Fuller*, (8 Met. 313.) There seems to be great difficulties in sustaining such statutes, when the constitution gives to congress the power to "provide for the punishment of counterfeiting the current coin of the United States," and congress has exercised that power, but the majority, as well as the weight of authorities, is on that side.

The reporter labored under some disadvantages, which in subsequent volumes he will be free from; but his work is creditably performed. We have spoken of this volume somewhat in detail for the reasons above given, and because we rarely read a new volume of new reports of so much merit and interest as this. How much of the unusual general importance of the cases is owing to the fact, that this volume embraces decisions for a considerable period before the appointment of Mr. Douglass, and is therefore a *selection* of cases, we can better judge when we see the next volume, which we are informed will soon be ready. One of the judges (Felch) has since been elected a senator of the United States.

New Books Received. — Reports of Cases Argued and Determined in the High Court of Errors and Appeals for the State of Mississippi. By W. C. Smedes and T. A. Marshall, of Vicksburg, Reporters to the State. Vol. VII. Containing Cases for November and January Terms, 1846. Boston: Charles C. Little and James Brown. 1847.

Reports of Cases Argued and Determined in the Supreme Court and in the Court for the Correction of Errors of the State of New York. By Nicholas Hill, Jun. Counsellor at Law. Vol. VII. Albany; Gould, Banks & Gould, 104 State street. New York: Banks, Gould and Company, 144 Nassau street. 1847.

Intelligence and Miscellany.

Mr. Webster and the Charleston Bar. — At a dinner recently given to Mr. Webster, by the members of the Charleston bar, he made some admirable remarks, in reply to a toast by Mr. J. L. L. Petigru, which have been published in the newspapers, and may have been read by most of our readers. The following extract, however, is worthy of being read many times: He and his brethren in the law, had met, this evening, he said, under the influence of common feelings — they were students of the same profession — followers and disciples of the same great leaders and teachers, whom history had chronicled for our contemplation and example — such as D'Aguesseau, Domat, Coke, Littleton, Mansfield and Holt, and other great names in Europe and America — great lights and luminaries, in every branch of the legal science, and in the principles of legislation. He asked, therefore, to be permitted to say that he felt it no common good fortune to belong to a profession so useful, so honorable, and so distinguished. Although it *might* not always, it *did* not often in this country lead to wealth, it enabled us to do what was infinitely more important — to do good in our day and generation; it was not calculated to yield them the greatest fortunes — it seldom, in this respect, met the sanguine expectations of beginners in the toilsome path. After twenty-five years' experience, he could say the condensed history of most, if not all, good lawyers, was, that they lived well, and died poor. In other countries, and in England especially, it was different. Great fortunes were there accumulated in every branch of the legal profession. Tidd, whose book of practice has been thumbed by them all, is said to have died worth £3,000,000. Many noble and wealthy families in England, had been built up on the acquisitions of the law. Such was not the course of things with us, nor, with our habits and inclinations, was it to be expected. The only regret that he felt, at the slenderness of professional emolument, arose out of the difficulty of impressing on the general mind sufficiently strong inducements to make adequate and honorable provision for those who were selected from the legal profession to go on the bench. In his opinion, there was no character on earth, save that of the divine head of our religion, more noble and pure than that of a learned and upright judge. There was no cause to which he would more cheerfully and more largely contribute the earnings of his life than the adequate support of the learned and upright judge. But, although such a character exerts an important agency in the public service and influence for the public good — an influence, like the dews of heaven, falling without observance — among a people of great activity like ours, it is not always sure to attract the proper regard or proper reward. Theirs was not a profession that accumulated wealth — their standing in society compelled them to live somewhat expensively, and, he might add, their inclinations, too. Lawyers always thought themselves bound to be hospitable; friends come to town, and they must be entertained. These positions were not disputable on authority, but were favored by every authority, from Lord Coke down. Out of the profession of the law magistrates were chosen to dispense private and public justice. This was a great proof of respectability of standing in a govern-

ment like ours. Merit, and not political favor, determined with us who should occupy the seat of justice. He would profane our institutions who would be bold and daring enough to put one on the bench, unqualified, in mind and morals, for the high position.

He said that the administration of justice was the great end of human society — all the complex machinery of government had for its object that a magistrate should sit, in purity and intelligence, to administer justice between individuals and the country. The judiciary, selected from their profession, made every one feel safe in life, liberty and property. Where was there a higher function or dignity than that of a chancellor, to dispense equity between litigants, and to the widow and orphan? Learned and virtuous judges were the great masters, and lawyers the apprentices of justice. No morality, save that of the Saviour of mankind, was more ennobling than that of a court of equity — as illustrated in the judgments of D'Aguesseau, Mansfield, in the writings of Sir Samuel Romilly, and in the decrees of Lord Eldon, and Judges Marshall, Desaussure, Kent and Story — no moral lessons, except those of Holy Writ, surpassed those taught by these great lights of the law on the subject of fiduciary relations, and in matters of trust and confidence. An eminent lawyer could not be a dishonest man — tell him a man was dishonest, and he would answer he was no lawyer — he could not be, because he was careless and reckless of justice — the law was not in his heart — nor the standard and rule of his conduct. A great equity lawyer had truly said that, ever since the revolution of 1688, law had been the basis of public liberty. He held it to be undoubted that the state of society depends more on elementary law, and the principles and rules that control the transmission, distribution and free alienation of property, than on positive institutions. Written constitutions sanctify and confirm great principles, but the latter were prior in existence to the former. The habeas corpus act, the bill of rights, trial by jury, were surer bulwarks of right and liberty than written constitutions. The establishment of our free institutions was the gradual work of time and experience, not the immediate result of any written instrument. English and our colonial history, were full of those experiments in representative government, which heralded and led to our more perfect system. When our revolution made us independent, we had not to frame government for ourselves — to hew it out of the original block of marble — our history and experience presented it ready made and well-proportioned to our hands. Our neighbor, the unfortunate miserably governed Mexico, when she emerged from her revolution, had, in her history, nothing of representative government, habeas corpus, or trial by jury, no progressive experiment tending to a glorious consummation; nothing but a government calling itself free with the least possible freedom in the world. She had collected, since her independence, $300,000,000, and had unprofitably expended it all in putting up one revolution and putting down another, and in maintaining an army of 40,000 men, in time of peace, to keep the peace.

QUEEN *v.* DUNN. — In the court of queen's bench the case of the "Queen *v.* Dunn," a prosecution of the well-known Mr. Dunn by Miss Burdett Coutts for perjury, came on for trial before Lord Denman. It will be recollected that Mr. Dunn suffered imprisonment in consequence of some inconvenient demonstrations of his professed affection for this wealthy lady. His love gradually took a less disinterested turn, and he began to seek for a pecuniary compensation for his wounded feelings. With this view, in 1846 he advanced a claim for 100,000*l*. He professed to found it on a written paper alleged to have been received from Miss Coutts, authorizing him to draw for that amount on Messrs. Coutts & Co.'s bank, in which Miss Burdett Coutts is a partner. His draft being dishonored, he applied to the other partner, to whom he produced his authority; it proved to be a copy of doggerel verses signed with the initials A. B. C.

Send to Coutts your bill,
There are lots in the till,
I'll give the clerk orders to do it;
Then get your discharge;
Your dear body enlarge,
And in Stratton street do let me view it;
And, by the by, love,
My affection to prove,
For your long incarceration,

Fill a good round sum in,
(As I've plenty of tin)
To make you a fair compensation.

Unable to obtain his "compensation," Mr. Dunn affected to regard the refusal as an act of bankruptcy, and he took formal steps to make Miss Burdett Coutts a bankrupt: to that end he made an affidavit of the debt, swearing that Miss Coutts had recognized the debt in her own hand-writing, "as compensation for divers injuries and imprisonment inflicted." This was the perjury. The jury found a verdict of "guilty," and Mr. Dunn was sentenced to be imprisoned in the queen's prison for eighteen months. [*Pennsylvania Law Journal.*

License Laws. — Since the decision of the supreme court at Washington, in relation to the constitutionality of state laws, regulating the sale of spirituous liquors, there seems to be increased excitement upon the subject. This is especially the case in Massachusetts, all licenses having been refused by the authorities in some of the principal cities and towns in the state. The petitions of sundry persons for licenses, were recently advocated before the mayor and aldermen of Boston, by Rufus Choate and George T. Bigelow, and opposed by Richard Fletcher and H. B. Stanton. The counsel for the petitioners insisted that the mayor and aldermen were bound to grant *some* licenses, and cited to this point *State* v. *Chartrand*, (7 Law Reporter, 107.) The petitions were not granted. In connection with this subject, our attention has recently been called to a bill reported in the legislature of Massachusetts, in 1839, by J. T. Buckingham, Charles Leighton, and M. H. Clapp, the fourth section of which was as follows: "All common dram-shops are hereby declared to be public nuisances, and it shall be the duty of the selectmen of any town, and of the mayor and aldermen of any city, to proceed against any common dram-shop within such town or city, and the person or persons keeping the same, in the same manner that a board of health, or health officer, is authorized by the Revised Statutes, chapter 21, sections 9, 10, and 11, to proceed in the prosecution for, and removal of nuisances, sources of filth and causes of sickness."

Hotch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

The most extraordinary spectacle is now presented in the New York newspapers, of notices — more or less inflammatory — for caucuses to nominate judges under the new constitution. There appear to be four tickets — "The Lawyer's ticket" — "The Independent ticket," the "Whig" and "Democratic." This is a spectacle sad to behold, in a state which stands first in our country for wealth and importance, and *should* rank first for intelligence. The political mountebanks, of all parties, who have succeeded in bringing about this state of things, will have much to answer for, in the diminished respect for the judiciary — the disregard of law — and the debased morality of the people, which will be the inevitable result; and those rigid defenders of "whatever is," who have for years opposed all legal reform in that great state may have the consolation of knowing that they will be held responsible in no small degree for the present state of things. When those who see abuses in the administration of justice — who know how to apply the remedy — neglect or refuse to do so; the people will come with a strong hand, and sweep away every vestage of existing institutions, destroying the good with the bad. The only consolation we have heard expressed at the present state of things in New York is, that it cannot be worse than what has been. We hope the true friends of the judiciary in our own state will learn a lesson from the occurrences in New York.

A case of interest and of novelty is now pending in Boston before referees. It is a bill in equity brought in the circuit court of the United States by a father, who, in 1843, conveyed the bulk of his property to his son, against the son. The bill alleges that the plaintiff was at the time of the conveyance, under the belief that the second advent of Christ was near, and that it was sinful to be found, at His coming, with much property on his hands. That the son took advantage of this belief and induced the father to convey to him property worth $40,000 for $1000 cash, and notes to the amount of $19,000, payable to his brothers and sisters, as and for their share of the property, including his own share. That he used practice to induce this conveyance. This case has been referred to Hon. J. M. Williams, Hon. S. Greenleaf, and Hon. William Baylies. R. Choate and G. Minot for the plaintiff; and B. Rand, B. R. Curtis and A. H. Fiske for the defendant.

At the dinner recently given to Mr. Webster by the Charleston bar, he declared, that he loved his and their common profession, and loved all who honored it. He regarded it as the great ornament, and one of the chief defences and securities of free institutions — it was indispensable to and conservative of

public liberty. He honored it from the bottom of his heart. If he saw anything, it was the law — that noble profession, that sublime science, which he and they all pursued — that had made him what he was. It was his ambition, coeval with his early manhood, nay, with his youth, to be thought worthy to be ranged under the banner of that profession. The law had been his chief stimulus — his controlling and abiding hope — nay, he might say, his presiding genius and guardian angel.

The Western Law Magazine speaks thus of the new constitution of New York: "We have always been earnest advocates of law reform, but the New York experiment goes far beyond anything we had dreamed of. It is in fact a revolution; and not the less so because a bloodless one. We hope that the people of that state will never see cause to regret what they have done; but we predict that, before many years, another convention will be called to reform some of the late reforms. There is a deep-seated veneration for ancient landmarks, which can ill brook to see them all swept away at once."

We learn that Judge Allen, of the eastern district court of Maine, is engaged upon a treatise on Mortgages. It is not improbable that he may resign his seat on the bench, and take up his residence in Massachusetts.

Hon. Thomas S. Williams, who has long and honorably presided as Chief Justice upon the bench of the Supreme Court of Errors in Connecticut, has tendered his resignation of that office to the General Assembly.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Adams, Benjamin,	Boston,	Bookbinder,	April 29,	Bradford Sumner.
Allen, Phillip A.	Taunton,	Block Printer,	" 7,	Horatio Pratt.
Allen, Seth,	Harwich,	Mariner,	" 19,	Nymphas Marston.
Allen, James,	Lynn,	Shoemaker,	" 19,	John G. King.
Alden, John,	Randolph,	Boot & Shoe Manuf.	" 21,	Sherman Leland.
Andrews, John,	Lynnfield,	Innholder,	" 7,	John G. King.
Badger, Ezra.	Quincy,	Stone Cutter,	" 26,	Sherman Leland.
Baker, Russell D.	Sandwich,	Carpenter,	" 13,	Nymphas Marston.
Billings, Silas,	Belchertown,	Tanner,	" 28,	Mark Doolittle.
Bliss, James L.	Fall River,	Tailor,	" 22,	C. J. Holmes.
Bolcom, Gilbert,	Boston,	Carpenter,	" 5,	Bradford Sumner.
Bond, S. D. & Bond, E. L.	Boston,	Merchants,	" 16,	Bradford Sumner.
Boos, George,	Medway,	Merchant Tailor,	" 17,	D. A. Simmons.
Boulter, Stephen H.	Natick,	Housewright,	" 23,	Nathan Brooks.
Bradstreet, Josiah,	Topsfield,	Shoemaker,	" 17,	Ebenezer Moseley.
Briggs, Caleb,	Rochester,	Esquire,	" 6,	Zechariah Eddy.
Brown, Joseph G.	Dorchester,	Stone Ware Manuf.	" 6,	Sherman Leland.
Brown, Francis B.	Boston,	Gentleman,	" 27,	Willard Phillips.
Bullard, Ezekiel W.	Barre,	Machinist,	" 16,	Walter A. Bryant.
Butler, John R.	Boston,	Lampmaker,	" 15,	George S. Hillard.
Caldwell, James A.	Boston,	Trader,	" 1,	Bradford Sumner.
Chase, Nathaniel, 3d	Harwich,	Mariner,	" 3,	Nymphas Marston.
Chase, Andrew, Jr.	Roxbury,	Housewright,	" 3,	David A. Simmons.
Cole, Zenas,	Rehoboth,	Yeoman,	" 1,	Horatio Pratt.
Crackbon, Lemuel,	Boston,	Merchant,	" 10,	George S. Hillard.
Davis, Horatio G.	Salem,	Teamster,	" 30,	David Roberts.
Fletcher, Lewis A.	Lowell,	Manufacturer,	" 28,	Josiah G. Abbott.
Ford, John,	Boston,	Victualler,	" 3,	Ellis Gray Loring.
Foster, George W.	Boston,	Trader,	" 22,	Bradford Sumner.
Frost, William P.	Boston,	Trader,	" 20,	Bradford Sumner.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Gale, A. C.	Boston,		April 22,	Bradford Sumner.
Hammond, Andrew,	Roxbury,	Carpenter,	" 22,	D. A. Simmons.
Hathaway, Andrew,	Boston,		" 24,	Bradford Sumner.
Hathaway, James B.	Fall River,	Trader,	" 7,	C. J. Holmes.
Haynes, William F.	Boston,	Shoe Dealer,	" 3,	Bradford Sumner.
Haynes, William F.	Roxbury,	Shoe Dealer,	" 23,	Bradford Sumner.
Hebard, Benjamin F.	Dorchester,	Trader,	" 19,	Nath'l F. Safford.
Hennessey, Patrick,	Boston,	Chair Painter,	" 2,	William Minot.
Hersey, Ira,	Lowell,	Manufacturer,	" 26,	George W. Warren.
Hobart, Elbridge G.	Charlestown,	Blacksmith,	" 21,	George W. Warren.
Holmes, Greenleaf C.	Methuen,	Painter,	" 2,	James H. Duncan.
Horn, Richard & Horn, Andrew et al.	Roxbury,	Builders,	" 6,	Sherman Leland.
Houghton, Samuel S.	Boston,	Trader,	" 30,	Bradford Sumner.
Huff, William B.	Lawrence,	Housewright,	" 24,	James H. Duncan.
Hunt, David W.	Boston,	Paper Manufacturer,	" 10,	George S. Hillard.
Keith, William W.	Boston,	Broker,	" 21,	Bradford Sumner.
Kimball, Alvah,	Chelsea,	Trader,	" 1,	Bradford Sumner.
Knowles, Elijah,	Brewster,	Blacksmith,	" 21,	Nymphas Marston.
Lander, Frederick W.	Danvers,	Engineer,	" 5,	Ebenezer Moseley.
Landers, George,	Falmouth,	Yeoman,	May 5,	Nymphas Marston.
Lang, Richard,	New Bedford,	Trader,	April 27,	John H. W. Page.
Leach, Benjamin,	Manchester,	Mariner,	May 6,	John G. King.
Little, Alden,	New Bedford,	Liv'y Stable Keeper,	April 19,	Oliver Prescott.
Lothrop, Edward W.	Stoughton,	Bootmaker,	May 7,	Aaron Prescott.
Marcy, Daniel,	Dudley,	Farmer,	April 10,	Isaac Davis.
Matron, David D.	Boston,	Shipwright,	" 19,	Bradford Sumner.
McIntire, Samuel,	Roxbury,	Trader,	" 22,	Sherman Leland.
McKinney, John,	Boston,	Grocer,	" 2,	Bradford Sumner.
Messer, James M.	Boston,		" 23,	Bradford Sumner.
Middleton, Thomas,	Boston,	Trader,	" 24,	George S. Hillard.
Miller, Hollis,	Westboro',	Yeoman,	" 14,	Isaac Davis.
Mirick, George W.	Boston,	Trader,	" 12,	Ellis Gray Loring.
Morrill, George W.	Weston,	Housewright,	" 6,	George W. Warren.
Moulton, Nye,	Springfield,	Innkeeper,	" 3,	E. D. Beach.
Neill, Denis O.	Sandwich,	Glassblower,	" 10,	Nymphas Marston.
Nourse, Thomas,	Salem,	Innholder,	" 22,	David Roberts.
Nowlan, Andrew,	Boston,	Plasterer,	" 7,	Bradford Sumner.
Packard, Abijah W.	Easton,	Laborer,	" 5,	Horatio Pratt.
Parker, Stoddard	Springfield,	Trader,	" 30,	E. D. Beach.
Parker, Chauncy C.	Longmeadow,	Trader,	" 27,	E. D. Beach.
Payvez, Cellestine,	New Bedford,	Cordwainer,	" 15,	J. H. W. Page.
Pearson, Timothy,	Lowell,	Gentleman,	" 22,	Josiah G. Abbott.
Penniman, Tyler S.	Paxton,	Boot Manufacturer,	" 5,	Chas. W. Hartshorn.
Perkins, John K.	Uxbridge,	Cabinet Manufac'r,	" 20,	Henry Chapin.
Pettys, Daniel C.	Boston,	Machinist & Eng'eer,	" 14,	Bradford Sumner
Platts, Colman,	Georgetown,	Shoe Manufacturer,	" 12,	James H. Duncan.
Pratt, Harris,	South Reading,	Cabinet Maker,	" 2,	George W. Warren.
Randall, Josiah,	Worcester,	Carpenter,	" 26,	Isaac Davis.
Reed, Jonathan M.	Chelmsford,	Esquire,	May 10,	Josiah G. Abbott.
Rhoades, Albert H.	Boston,	Tailor,	April 12,	Ellis Gray Loring.
Ridgway, John W.	Boston,	Gentleman,	" 22,	George S. Hillard.
Ross, John C.	Roxbury,	Mason and Plasterer,	" 6,	David A. Simmons.
Rowe, Greenleaf D.	Boston,	Carpenter,	" 23,	Bradford Sumner.
Rowley, Reuben,	Boston,	Fancy Varnisher,	" 28,	Bradford Sumner.
Savil, Benjamin F.	Quincy,	Shoemaker,	" 16,	Sherman Leland.
Shaw, Cushing,	Northampton,	Innholder,	" 10,	C. P. Huntington.
Sibley, Rodney,	Roxbury,	Trader,	" 24,	Sherman Leland.
Simpson, Edwin L.	Woburn,	Pat't Leath'r Dresser,	May 7,	George W. Warren.
Sinclair, Joseph F. et al.	Roxbury,	Builder,	April 6,	Sherman Leland.
Skinner, Henry B.	Waltham,	Physician,	" 22,	George W. Warren.
Smith, William F.	Dracut,	Attorney at Law,	" 14,	George W. Warren.
Smith, Chauncy,	Warren,	Yeoman,	" 6,	Henry Chapin.
Southwick, Sumner,	Danvers,	Provision Dealer,	" 19,	John G. King.
Spaulding, Asaph,	Leominster,	Cabinet Manufact'r,	" 26,	Isaac Davis.
Spofford, Amos,	Georgetown,	Innholder,	" 10,	Ebenezer Moseley.
Stickney, John B.	Boston,	House Carpenter,	" 27,	Bradford Sumner.
Stimpson, Sanford J.	West Stockbridge,	Tailor,	" 6,	Horatio Byington.
Swain, Natt,	Ashby,	Butcher,	" 10,	Bradford Russell.
Teban, Maurice,	Springfield,	Laborer,	" 17,	E. D. Beach.
Thomas, John W.	Weymouth,	Trader,	" 15,	Sherman Leland.
Thomas, Freeman,	Wayland,	Housewright,	" 23,	Nathan Brooks.
Torrey, William,	Springfield,	Mechanic,	" 15,	E. D. Beach.
Tucker, Noah M.	Boston,	Baker,	" 22,	Sherman Leland.
Tucker, George,	Boston,	Carpenter,	" 5,	Willard Phillips.
Turner, John W.	Lowell,	Trader,	" 17,	Josiah G. Abbott.
Wales, Nathaniel,	Braintree,	Housewright,	" 15,	Nath'l F. Safford.
Wells, Thomas,	Boston,	Gentleman,	" 29,	Bradford Sumner.
Wellington, David,	Lowell,	Trader,	May 10.	Josiah G. Abbott.
Williams, George, Jr.	Hubbardston,	Merchant,	April 21,	Walter A. Bryant.